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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1958~~ 1960

No. ~~674~~ 33

ARTHUR M. McPHAUL, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 3, 1960
CERTIORARI GRANTED MARCH 21, 1960

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 13,285

ARTHUR M. McPHAUL, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Appendix for Appellant—Filed January 13, 1958

[File endorsement omitted]

[fol. 1]

APPENDIX

DOCKET ENTRIES

1954		
July	29	Indictment and report filed—warrant issued.
"	30	Appearance filed.
"	30	Arr. has counsel, Ernest Goodman, stands mute, plea of not guilty entered. Released on $10,000 per. recog.
Aug.	3	Transcript filed.
"	3	Warrant filed.
"	9	Stipulation and order granting deft. an additional 30 days in which to file a motion for Bill of Particulars, filed. Order entered.
"	31	Stipulation and order granting deft. an additional 30 days in which to file a motion for Bill of Particulars, filed.

1956

Jan. 17 Notice of trial for Feb. 1/56, filed,

" 18 Notice of pre-trial for Jan. 23/56, filed.

" 23 Pre-trial had.

Feb. 1 Motion to dismiss indictment, filed.

" 7 Notice of hearing for Feb. 27/56 of motion to dismiss filed.

" 27 Hearing on motion to dismiss adj. to Mar. 12/56.

Mar. 12 " " " " " " Apr. 2/56

" 9 Answer to motion to dismiss indictment filed.

Apr. 9 Hearing on motion to dismiss adj. to Apr. 16/56.

" 16 Motion to dismiss argued and submitted with briefs to be filed.

" 30 Hearing on motion to dismiss—motion denied.

May 31 Transcript filed.

July 13 Notice of trial for Aug. 29/56, filed.

Nov. 16 " " " " Jan. 8/57, filed.

[fol. 2]

1956

Dec. 18 Jury trial commenced—adj. to Dec. 19/56.

" 19 " " resumed—Verdict of jury guilty as charged. Ref. Bond cont'd.

" 19 Deft's request to charge filed.

" 19 Gov't request to charge filed.

" 26 Transcript of Dec. 19/56 filed and returned.

1957

Jan.	11	Subpoenas filed.
Mar.	8	Deft. rep. by Ernest Goodman, attorney, sentenced to imprisonment for nine months and pay committed fine of $500.00. Personal bond cont'd pending of appeal.
"	8	Notice of appeal filed.
"	8	Personal bond in $10,000.00 on appeal filed.
"	11	Proof of mailing filed.
"	12	Transcript of Mar. 8/57 filed.
Apr.	9	" " Dec. 18/56 filed.
"	9	Stip. and Order extending time to file record on appeal to June 3/57 filed and entered.
May	31	File mailed to C. C. A.
June	4	Acknowledgment filed.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

INDICTMENT—Filed July 29, 1954

The Grand Jury charges:

Pursuant to Public Law 601, Section 121, Subsection (q) (2) of the 79th Congress, and under House Resolution #7 of the 82nd Congress, the House of Representatives was empowered to, and did, create a Committee on Un-American Activities, having duties and powers as set forth in said Public Law.

Arthur McPhaul, having been summoned as a witness by the authority of the House of Representatives of the United States by a subpoena served upon him on February 18, 1952, to produce before said Committee or a duly authorized subcommittee, records upon the matter under inquiry before the said Committee, that is, to produce documents of the Civil Rights Congress relating to, (A) All records, correspondence, and memoranda pertaining to the organization of, and (B) The affiliation with other organizations, and (C) All moneys received or expended by the Civil Rights Congress.

Defendant Arthur McPhaul appeared before the said Committee or a duly authorized subcommittee thereof, on February 27, 1952, at Detroit, Michigan, in the Eastern District of Michigan, Southern Division, but did then and there fail and refuse to produce said records, and thereby did wilfully make default, in violation of Section 192, USC, Title 2, and Section 194, USC, Title 2.

A True Bill.

.....
Foreman

Fred W. Kaess, United States Attorney; George E. Woods, Chief Assistant U. S. Attorney.

[fol. 4]

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS INDICTMENT—Filed February 1, 1956

The defendant moves this Court, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, to dismiss the indictment herein for the following reasons:

1. The indictment and the subpoena on which it is based (a copy of which is attached hereto) fails to state whether the documents called for by the subpoena issued to defendant were subject to the control or in the custody of the defendant; it fails to state the relationship, if any, between the defendant and the Civil Rights Congress whose records defendant was required to produce.

2. The indictment, and the subpoena upon which it is based, fails to state facts setting forth the nature of the inquiry within the purview of the House Committee on Un-American Activities, which issued the subpoena, and the relevancy and materiality to that inquiry of the records called for in the subpoena.

3. The indictment fails to set forth facts showing that the requirements of Title 2, Section 194, U. S. C. have been complied with.

4. The Law creating the House Committee on Un-American Activities is unconstitutional in that:

a) The term "Un-American" is too vague to serve as a legal basis for the committee to function; and,

b) The subject matter of its inquiry as construed and applied by the Committee violates rights guaranteed by the First Amendment.

[fol. 5] 5. The scope of the subpoena was such as to violate defendant's rights under the Fourth Amendment to the United States Constitution.

Goodman, Crockett, Eden & Robb, By Ernest Goodman, Attorneys for Defendant, 3220 Cadillac Tower, Detroit 26, Michigan, Woodward 3-6268.

Dated at Detroit, Michigan this 1st day of February, 1956.

[fol. 6] ATTACHMENT TO MOTION TO DISMISS INDICTMENT

By Authority of the House of Representatives of the Congress of the United States of America.

To United States Marshal

You are hereby commanded to summon Arthur McPhaul, 252 East Palmer, Detroit, Mich. to be and appear before the Committee on Un-American Activities or a duly authorized subcommittee thereof of the House of Representatives of the United States, of which the Hon. John S. Wood is chairman, together with all records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the Civil Rights Congress in Room 737 Federal Building Detroit, Mich. on Tuesday Feb. 26, 1952, at the hour of 10:00 A. M. then and there to testify touching matters of inquiry committed to said Committee; and he is not to depart without leave of said Committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 13th day of February, 1952. John S. Wood, Chairman.

(Seal)

Attest:

Ralph R. Roberts, Clerk.

[fol. 7]

IN UNITED STATES DISTRICT COURT

Excerpts from Transcript of Proceedings

* * * * * * *

(Excerpts from proceedings had upon the trial of the above-entitled cause, before Honorable Ralph M. Freeman, District Judge, and a jury duly empanelled, commencing on Tuesday, December 18, 1956, at Detroit, Michigan; and continuing thereafter pursuant to adjournments hereinafter noted.)

APPEARANCES:

George E. Woods, Chief Assistant United States Attorney, 817 Federal Building, Detroit 26, Michigan, Appearing on behalf of the Government.

Ernest Goodman (Goodman, Crockett, Eden & Robb), 3220 Cadillac Tower, Detroit 26, Michigan, Attorneys for the Defendant.

Detroit, Michigan
Tuesday, December 18, 1957
9:30 o'clock A. M.

(The jury was duly empanelled and sworn to try the issues.)

OPENING STATEMENT FOR THE GOVERNMENT

* * * * * * *

Mr. Woods: Senator Potter, will you please take the witness stand.

[fol. 8] CHARLES E. POTTER, was thereupon called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Woods:

Q. Your full name, please?

A. Charles Edward Potter.

Q. And you are presently the senior Senator from the State of Michigan, is that right?

A. That is right.

* * * * * * *

A. The 82nd Congress began in January, January 3, I believe, the 3rd or 5th, of 1950, until January 3 of 1952—of '53, I should say.

Q. Would it not be 1953?

A. From '51 to '53, that is correct.

Q. I will ask you, Senator, among other committees, were you not a member of the House committee on un-American activities?

A. That is correct.

* * * * * * *

Q. Now, you spoke of a sub-committee, of which you were appointed a member, in February of 1952. Do you recall then who the other members of that sub-committee were?

A. I believe the other members were Chairman Wood, Jackson, and Moulder.

Q. I will ask you whether or not those gentlemen were in fact present at the time of those hearings?

A. I know that Chairman Wood, Jackson and myself [fol. 9] were present; I am not certain about Representative Moulder.

The Court: Chairman Wood, and who else?

A. Jackson and myself. I am not certain about Moulder. He was present part of the time, and part of the time he was not. I am not certain of what particular time he was absent.

Mr. Wood: Mark this as Government's exhibit 1, please.

(A document was marked Government's Exhibit 1.)

Q. Senator, I will show you Government's proposed exhibit 1, and I will ask you if you can identify that for us?

A. Yes, this is a hearing, or part of a hearing of the House Committee on un-American Activities, of the Detroit hearings in February, or early in 1952.

Q. Part 1, of two parts, is that right?

A. That is right.

Q. That is a printed copy thereof?

A. That is right.

OFFER IN EVIDENCE AND COLLOQUY PERTAINING THERETO

Mr. Woods: We offer Government's proposed exhibit No. 1 in evidence, your Honor.

Mr. Goodman: This is a document which I examined, of course, before the hearing. This is only a very small portion that relates to the issues here. I certainly will object to the introduction of the entire document.

Mr. Woods: I can denominate which particular part.

Mr. Goodman: If counsel intends to offer it all, I object to its materiality. If he intends to offer only a part of it. [fol. 10] I would like to know which particular part he offers.

Mr. Woods: We offer at this time, your Honor, as material, that part of Government's proposed exhibit No. 1, beginning on page 2870, through 2876, both inclusive, that constituting the testimony of Arthur McPhaul before a sub-committee of the House Committee on un-American Activities, on February 27, 1952, in Detroit, Michigan.

Mr. Goodman: As to that portion, I can not agree to the introduction of the entire testimony, for this reason: The only charge in the indictment is failure to produce the documents. The House resolution authorizing the procedure here also relied upon failure to answer questions, but apparently the grand jury did not indict for that reason. And therefore, I think the only portion of this testimony which is relevant here would be that portion which relates to the question as to the production of the documents, and not other questions unrelated to that.

I have gone over this myself, and I would be glad to indicate to your Honor where I think the testimony relates to the production of documents and where it relates to other matters. If your Honor wants to do that, I would be glad to take that up.

The Court: What do you have to say about that, Mr. Woods? Do you want to further limit your offer of the exhibit?

Mr. Woods: No, we do not. We feel that the whole testimony is so interrelated that it is difficult, if not impossible and impracticable to flyspeck it and pick out isolated instances of the testimony apart from the balance of it, both in fairness to the Government and in fairness to the defendant as well.

[fol. 11] The Court: You contend that all of the testimony on the pages you have indicated is relevant to the issue here?

Mr. Woods: We do.

Mr. Goodman: I do not think any flyspecking will be necessary, because as I see it the only part, the only portion of this record beginning on about the second third of page 2872, until the end, does not have anything to do with the production of the records.

The Court: I suppose the only way I could rule on that objection would be to examine the exhibit.

Mr. Goodman: I think so, your Honor.

Mr. Woods: Yes. Let us pass that for a moment, and I will give your Honor a later opportunity to examine that.

The Court: All right.

Mr. Woods: We would also ask Mr. Goodman, as to Government's Exhibit No. 1, to have admitted—though we will cover this at a later point in this testimony of the Senator—page 2711, the first page, beginning with the denomination of Mr. Wood, as speaking, which is a third or a quarter of the way down the page, over to page 2713, to the point where the testimony of a witness commences, the first witness commences.

The Court: Is there any objection to that portion of it, Mr. Goodman?

Mr. Goodman: Well, the only relevancy I would see to that statement is in support of the Government's contention

that the inquiry was within the scope of the congressional resolution, perhaps.

[fol. 12] Mr. Woods: And for that reason we certainly think it is pertinent and relevant and is admissible.

Mr. Goodman: But I think it has to be limited only for that purpose, and not to the proof of whatever statements happen to be in that. It apparently represents statements by the chairman, which would be hearsay in any event. But if it is limited to the purpose of showing the objectives of the investigation as related to the authorization by the Congressional committee, I think it would be relevant for that purpose.

The Court: Do you offer it subject to that condition, Mr. Woods?

Mr. Woods: I agree.

The Court: All right. Then I will receive that portion on pages 2711 to 2713, as indicated by Mr. Woods, subject to that condition.

Mr. Woods: All right. Then one other thing, but I will have to consult with my witness for one short moment.

(There was a conference off the record.)

Mr. Woods: I might as well do this now, rather than wait until we get to the point. On page 2743—

Mr. Goodman: You do not have a copy of that separate for me to look at, do you?

Mr. Woods: No, I do not. Well, yes, I have a copy of this. Page 2743 of Government's proposed exhibit 1—let me mark that 2711 for you.

The Court: All right. Mark that other one, as well.

[fol. 13] Mr. Woods: Yes. On page 2743 of Government's proposed exhibit No. 1, has indicated on the copy of the proposed exhibit made available to the Court, and is now indicated to defense counsel.

Mr. Goodman: Does your Honor have that portion there? I want to object.

The Court: Is it the portion underlined?

Mr. Goodman: Yes sir. I want to object to it on the ground that it would be a hearsay statement with respect to this defendant.

Mr. Woods: Bear in mind, your Honor, that the Government does not have any reason for asking that statement's admissibility, for the truth or the proof of that matter there asserted by that witness. That is not the point.

The Court: What purpose is it offered for?

Mr. Woods: Merely to show the pertinency of the committee, having probable cause and reason to so subpoena this defendant.

Mr. Goodman: Then I will have a further objection.

Mr. Woods: Just let me finish. It has been done in other cases, that such testimony as the Government has indicated to your Honor there, is most assuredly admissible, but some District Courts have been inclined to take such testimony out of the presence of the jury, only for the purpose of establishing pertinency, the Government's remedy ultimately being that they would ask the Court for an instruction to the jury to charge on the issue of pertinency.

Mr. Goodman: I have one further objection, that the testimony on that page would not be relevant to the issue of pertinency.

[fol. 14] The Court. Are there any other objections to the transcript? Are there any other portions of the transcript that you wish to offer?

Mr. Woods: I would say no at this point, but I would ask the court not to foreclose me from later asking for other portions.

The Court: That is all you are offering at the present time?

Mr. Woods: That is right.

The Court: I have noted Mr. Goodman's objections to the first portion offered, that is, the portion on pages 2870 to 2876, and also that portion on page 2743.

Mr. Woods: That is correct.

The Court: And I have admitted—

Mr. Woods: 2711.

The Court: The portions, pages 2711 to 2713, which purportedly is a statement of one or more of the members of the committee.

Mr. Woods: The chairman of the committee.

The Court: And that portion is offered only for the purpose of stating the objections of the committee, and not to establish the truth of the statements made.

Mr. Woods: Yes.

[fol. 15]

Afternoon Session
2 o'clock P. M.
Tuesday, December 18, 1956

(The following proceedings were had out of the presence and hearing of the jury):

The Court: Before you call in the jury, let the record show that the court has gone over those portions of the transcript of the hearing of the committee which was offered in this case as Government Exhibit 1, and that the court has also gone over this exhibit with counsel for the Government and also with the defendant's attorney.

Now do I understand that there will be any objection to offering that portion of the transcript appearing on page 2743 which relates to the testimony of Mr. O'Hair, insofar as reference is made therein to the defendant Arthur McPhaul, being offered out of the presence of the jury?

Mr. Goodman: With this modification: I do not concede that the person named in that testimony is the defendant, I do not know one way or the other. I make no concession as to that: I notice the name "Arthur McPhaul" there; and as to that statement, I have no objection to taking that statement in evidence outside of the jury, on the issue of pertinency as far as the authority of the congressional committee to investigate this matter and issue the subpoena. As to that issue, I think—

The Court: You raise a question as to the pertinency of it?

Mr. Goodman: That is right.

The Court: Likewise, certain portions of the proceed-
[fol. 16] ings appearing within pages 2870 to 2876, the Court has discussed with counsel the admissibility of those proceedings and testimony, and the court is inclined to

admit certain of those proceedings appearing at the bottom of page 2873 and the top of page 2874 out of the presence of the jury, that portion beginning with a question asked by Mr. Tavenner to this effect:

"Are you acquainted with a person by the name of Richard F. O'Hair?"

And concluding with the answer of Mr. McPhaul on page 2874 to the effect "Invoking my rights under the 5th Amendment, I refuse to answer the question."

That answer is Mr. McPhaul's third answer on page 2874.

Is there any objection to admitting that portion of the proceedings out of the presence of the jury, as bearing upon the pertinency, the element of pertinency here?

Mr. Goodman: No, your Honor; for that purpose, I have no objection.

The Court: Now, I understand that there is no objection to the admissibility of the statement made by the chairman of the committee commencing on page 2711, and concluding on page 2713, just before the testimony of Richard Franklin O'Hair?

Mr. Woods: You can stop before that, your Honor. After "Mr. Counsel, are you ready to proceed"?

The Court: You want to delete some of that?

Mr. Woods: The rest of it, the byplay between counsel and the congressman.

[fol. 17] The Court: All right.

Mr. Woods: Stop right here (indicating on transcript).

The Court: All right. And I think it was agreed this morning that that statement would be submitted only for the purpose of stating the objectives and purposes of the committee and the inquiry, and not as any proof of the matters therein stated.

Mr. Woods: That is right.

The Court: And I think Mr. Goodman asked for that restriction. I believe that was agreed to, was it?

Mr. Woods: We feel that he is entitled to an instruction on that, yes.

The Court: Subject to that, do you have any objection, Mr. Goodman, to that statement?

Mr. Goodman: Subject to your Honor's stated restriction, I have no objection.

The Court: All right. And then with respect to the remaining portions of the last part offered, beginning on pages 2870 and concluding on 2876, the Court will admit that portion commencing with the testimony of Arthur McPhaul near the top of the page, or rather down about the page, about a third of the way down the page, and concluding with a portion of the answer of Mr. McPhaul on page 2872 where he says "I will not", period. The Court rules that that portion of the proceedings is pertinent and relevant, and will admit that.

Mr. Woods: In the presence of the jury.

The Court: In the presence of the jury; and also that [fol. 18] portion appearing on page 2874 commencing with the question by Mr. Tavenner to the effect, "Were you in this room during the testimony on Tuesday of Walter Scott Dunne," and concluding with the answer of Mr. McPhaul to the effect, "I was here in answer to the subpoena",—I will admit that portion, which consists of three questions and about three answers.

I might add, so we can clear the matter, are there any objections to the rulings of the court with respect to the admissibility of the portions of the transcript of these proceedings, allowed as the court has now indicated?

Mr. Goodman: No, I have no objections to your Honor's ruling as limited.

The Court: All right. Now, I think, in view of the ruling of the court and the agreement of counsel, that there will be some matters to be taken up out of the presence of the jury; and therefore, I think, before we bring in the jury it would be well to offer that testimony now, if that is agreeable to counsel.

Mr. Goodman: It is agreeable.

[fol. 19] CHARLES E. POTTER, was thereupon recalled as a witness on behalf of the Government, and having been previously duly sworn, testified further as follows (out of the presence and hearing of the jury):

Direct examination (continued).

By Mr. Woods:

Q. Well, skipping what otherwise we have covered, I will ask you what was the purpose and reason for the committee summoning by way of this subpoena here before us Arthur McPhaul to produce certain records there enumerated of the Civil Rights Congress?

Mr. Goodman: Just a moment. I want to object to that question on the ground that it represents a conclusion on the part of the witness as to the action of the committee; and secondly, it would be hearsay since the actions of the committee are joint matters which can not be proved, in my view, by the testimony of one of the members of the committee. If they are official actions of the committee, they would speak for themselves.

Mr. Woods: Well, I certainly think, your Honor, if he knows why Mr. McPhaul was subpoenaed—

The Court: Will you state the question again, please? Strike the previous question, and restate the question, so that the court can have that.

By Mr. Woods:

Q. What was the purpose and reason that Arthur McPhaul was subpoenaed before this sub-committee at the time indicated here to produce records of the Civil Rights Congress?

[fol. 20] Mr. Goodman: My objection stands to that question.

The Court: Your objection to this question is the same objection you made to the previous question?

Mr. Goodman: Yes, and for the same reasons.

The Court: This is taken out of the presence of the jury, and I think I will receive the answer.

A. The Civil Rights Congress prior to this time had been declared a subversive organization by the Attorney-General.

By Mr. Woods:

Q. Do you recall when that was?

A. I believe in 1947, I am not certain of the exact date. The committee had information that Mr. McPhaul, according to the letterheads of the Civil Rights Congress of the state of Michigan, that he was an executive director—executive secretary of the Civil Rights Congress, and therefore that fell within the purview of our committee.

Mr. Goodman: May I have the portion of the answer stricken which I had not anticipated would be included in the answer, and that is with reference to the finding, I believe, of the Attorney-General as to the character of the Civil Rights Congress. In addition to the objections I made to the question, I think that would be peculiarly a matter of hearsay, and objectionable on that ground.

Mr. Woods: Well, of course, bear in mind, your Honor, once again, we are not here concerned with the necessary incidence of receiving this testimony of that which he is asserting as a fact; it is merely to show the pertinency and relevancy, and the probable cause, as it were for them, number one, making such an investigation; and number [fol. 21] two, summoning Mr. McPhaul; and number three, summoning books and records and memoranda of the Civil Rights Congress.

The Court: Do you intend to offer other proof that the Attorney-General had declared this organization, the Civil Rights Congress, a subversive organization?

Mr. Woods: I had not intended to. I believe I could get a document to that effect, I am not sure.

The Court: Do you expect to?

Mr. Woods: If he knows, having been a member of that committee, that it was set forth on the so-called Attorney-General's list of subversive organizations,—

The Court: Of course, that is an official action in itself.

Mr. Woods: Yes, that is right.

The Court: On the part of another Government official.

Mr. Woods: That is an executive order of the Attorney-General, and of which, if he had knowledge of it, in his capacity on that committee, we feel that he could testify to it.

The Court: Of course, I take it, if the objection is pressed, I would have to rule that there would be better evidence of that, and strike that portion of the answer. And then also about this matter of the letter in the file, will there be other evidence offered of that?

Mr. Woods: We will offer the letter, in the presence of the jury, not the body of the letter, but merely the 2-page letter, for the purpose of introducing the letterhead—

The Court: I understand.

[fol. 22] Mr. Woods: We are not interested in the contents of the letter.

The Court: Then I will let that portion of the answer stand subject to being supported by other proof.

Mr. Woods: All right.

By Mr. Woods:

Q. Senator, I will ask you whether or not either at the so-called executive or closed sessions, or the public hearings, Mr. McPhaul was ever identified, as a member of the Civil Rights Congress?

Mr. Goodman: I will object to that on the ground that it constitutes hearsay.

* * * * * * *

Mr. Woods: I will concede it is hearsay. I do not think that has anything to do with its admissibility for the purpose for which it is offered.

The Court: Well, the only thing that bothers me is, as I understand it the court must pass on this question of pertinency.

Mr. Woods: That is right.

The Court: To ask the witness this question, it is almost a conclusion, isn't it? And how can the court say that there was pertinency here that would entitle the committee to investigate, unless there was something of an actual nature, whether it is hearsay or otherwise? Do you say to the court

that the committee is entitled to act from hearsay information?

Mr. Woods: Certainly.

The Court: But the hearsay information would have to relate, wouldn't it, to something specific, so that the court [fol. 23] could conclude that there was a sufficient basis for finding that there was a pertinency here?

Mr. Woods: You are putting the cart before the horse.

The Court: Is there a transcript of these proceedings that would form the basis for the question?

Mr. Woods: We are opening a whole new area that might run us afoul here. We may well open a whole new area that might let us run into a great deal of trouble. Let us suspend our line of questioning on that avenue for a moment.

The Court: All right.

By Mr. Woods:

Q. I will show you Government's Exhibit No. 1, Senator, and ask you to refer to page 2743, which, as I understand it —and correct me if I am wrong—is a transcript of the testimony of one witness by the name of O'Hair, on the 26th day of February 1952, is that correct?

A. You say the 26th, or the 25th?

Q. Which date is it?

A. The 25th.

Q. Excuse me. The 25th. You were present on that date, is that not correct?

A. Yes.

Q. Now, referring to that page 2743, Senator, I will ask you whether or not there is any place there indicated on that page that the witness O'Hair, at the hearing held on that date, at that time and place heretofore indicated, referred at all to this defendant Arthur McPhaul?

[fol. 24] A. Yes, there is.

Q. And is that not in fact underlined on that page?

A. That is correct.

Q. And would you read that for us, please?

A. (Reading) "Arthur McPhaul was a member of the Midtown Club of the Communist Party."

Q. Referring to the same exhibit, and I will refer you to page 2873, which is a portion of the testimony of Mr.

McPhaul on the 27th day of February, 1952, is that not correct, Senator?

Mr. Goodman: What page is that?

Mr. Woods: 2873. It is that, Mr. Goodman, which we covered in conference.

By Mr. Woods:

Q. Now, I will ask you, Senator, if you will, to read, beginning on page 2873, with the question of Mr. Tavenner, "Are you acquainted with a person", etc., and continue with the reading thereof, over to the point on page 2874 where indicated by a line, "Mr. McPhaul, Answer: I refuse to answer the question." Will you read that portion?

A. (Reading):

"Mr. Tavenner: Are you acquainted with a person by the name of Richard F. O'Hair?

Mr. McPhaul: Invoking my privileges under the fifth amendment, I refuse to answer that question.

Mr. Tavenner: Were you present during the course of his testimony on Monday of this week?

Mr. McPhaul: Will you repeat the question?

[fol. 25] Mr. Tavenner: Were you present in this courtroom when Mr. O'Hair testified on Monday of this week?

Mr. McPhaul: No, I was not.

Mr. Tavenner: Mr. O'Hair identified you as a member of the Communist party. Do you wish to deny or affirm that or explain it?

Mr. McPhaul: Will you restate the question?

Mr. Tavenner: Were you—(addressing official court reporter) read the question.

(The question was read by the official court reporter.)

Mr. McPhaul: Invoking my rights under the Constitution, and the fifth amendment, I refuse to answer the question.

Mr. Tavenner: Mr. O'Hair testified in this respect with regard to you. 'Arthur McPhaul was a member of the Midtown Club of the Communist Party.' Were you at any time a member of the Midtown Club of the Communist Party?

Mr. McPhaul: Invoking my rights under the fifth amendment, I refuse to answer the question."

By the Court:

Q. Senator, is the Mr. McPhaul whose name is indicated in the transcript of proceedings you have been reading from the same Mr. McPhaul, the defendant Arthur McPhaul in this case?

A. That is right.

By Mr. Woods:

Q. Now, perhaps I should go back to my other question. What reason, therefore, in view of the scope of powers of [fol. 26] the committee, as enunciated, did you have in subpoenaing Arthur McPhaul to produce the documents requested in the subpoena, of the Civil Rights Congress?

Mr. Goodman: I will object to that. I have already stated my objections to a similar question. A witness who is a member of the committee may not testify as to why the committee as a whole acted. Official actions speak for themselves; and secondly on the ground that his statement would be a conclusion.

The Court: Just read me the first few words of that question, please.

(The question was repeated by the reporter.)

The Court: This is also taken out of the presence of the jury. I will let the witness answer the question.

A. The committee had information that Mr. McPhaul was executive director or executive secretary of the Civil Rights Congress. Based upon that knowledge of the committee, Mr. McPhaul was subpoenaed to produce the documents.

Q. In view of the enunciated powers and scope of the committee, and the purposes and objectives of the committee, how did you feel the documents requested of the Civil Rights Congress would be material to such investigation?

Mr. Goodman: I will object to that as representing an opinion or conclusion, I don't know which, perhaps both. I object on that ground.

The Court: This is also out of the presence of the jury. [fol. 27] I will let the witness answer.

A. As I testified before—

By Mr. Woods:

Q. Do you have the question clearly?

A. Yes. As I testified before, the Civil Rights Congress had been declared a subversive organization by the Attorney-General. The committee found, along with the Attorney-General, that the Civil Rights Congress was a Communist front organization. The enunciated purpose of our hearings here in Detroit was to determine the extent of Communist activity in the area. Therefore, the committee subpoenaed the records of the Civil Rights Congress as pertinent to our investigation.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Woods: Have we now in mind all of that which was to be covered outside the presence of the jury now?

Mr. Goodman: Yes, I think so. However, sitting here and thinking in between some of these discussions, I decided to change my mind on one matter, and that is that I think that first part of this testimony of Mr. McPhaul—not his testimony, but the statement of the chairman of the committee, but the first statement of the chairman of the committee when they opened the hearings—

Mr. Woods: On 2711 now?

Mr. Goodman: 2711, that is at the beginning of this.

Mr. Woods: All right.

Mr. Goodman: I am going to ask that that be taken outside the presence of the jury, since I think that relates to the question of the objectives of the committee, and therefore the pertinency of the investigation and the subpoena directed against the defendant, I do not see how that relates [fol. 28] to the issues that are to be submitted to the jury. It certainly could not be proof of the matters that are contained in the statement made there by the chairman. And therefore, I want to modify my previous statement. I do not object to this as bearing upon the question of investigatory powers of the committee or the question of pertinency, but I would object to presenting it to the jury with respect to the other issues in the case.

The Court: What is the Government's position on that? I might say I haven't read that because I had assumed there

would be no objection. Now that there is an objection to it, it is objectionable as evidence before the jury. If the Government intends to press that as being admitted as evidence in the case to be submitted to the jury, I would have to read it.

Mr. Woods: May I have a brief moment?

The Court: Yes.

Mr. Woods: Mr. Goodman, and your Honor—

The Court: Do you want this on the record?

Mr. Woods: Yes, on the record. I have upstairs, utilized in another case, another House resolution, I think of the subsequent Congress, I believe it was the 83rd Congress, though we are here concerned with the investigation that was conducted by a body of the 82nd Congress, nonetheless the formal House resolution adopting the section pertaining to the House Committee on un-American Activities is the same whether it is the 83rd or the 82nd,—which in effect and substance is going to read exactly the same as I [fol. 29] just read to your Honor from the brief here ten minutes ago. I am going to want that resolution pertaining to the setting up of the House Committee on un-American Activities, to show its scope and its powers admitted into evidence. Or if Mr. Goodman will agree that that which I have previously read here is admitted into evidence in front of the jury, that will be sufficient. Do you have any objection to that?

Mr. Goodman: I have no objection on the basis that you are not accurately quoting what you have said. I will take your word for that.

Mr. Woods: That happens often.

Mr. Goodman: Subject to our checking it later. And at this time may I ask what the relevancy of that is for the jury.

The Court: What is that again?

Mr. Goodman: I wonder what relevancy that has before the jury; I wonder what relevancy it has so far as the issues submitted before the jury.

The Court: You mean the last statement here?

Mr. Goodman: No.

The Court: The resolution?

Mr. Goodman: Yes. I guess I have no objection to it.

Mr. Woods: Not that the words "un-American activities" does not carry a connotation which is known to every school child, nonetheless I must have, or I would like to have before the jury the House resolution itself which sets forth word by word the scope and powers.

The Court: The resolution, wouldn't that be one of the [fol. 30] elements of the offense?

Mr. Goodman: I have no objection to it.

Mr. Woods: All right. Then I will have no objection to 2711 through 2713, where heretofore indicated being taken now out of the presence of the jury, and confined to that.

The Court: You are referring now to pages 2711 to 2713 in the transcript, in that exhibit?

Mr. Woods: In Exhibit 1.

The Court: In Exhibit 1?

Mr. Woods: Right.

The Court: All right.

Mr. Woods: I will hand this to you.

Mr. Goodman: I have no objection to your reading it, if you want to, Mr. Woods.

The Court: You can read it, or Mr. Woods, either one.

Mr. Woods: Reading from page 2711 forward, of Government's Exhibit No. 1, "Communism in the Detroit Area—Part 1.

"Monday, February 25, 1952.

United States House of Representatives,
Subcommittee of the Committee on Un-American Activities.

Detroit, Michigan

Public Hearing.

A subcommittee of the Committee on Un-American Activities met pursuant to call at 1:30 P. M. in room 740 Federal Building, in Detroit, Mich., the Honorable John S. [fol. 31] Wood (chairman), presiding.

Committee members present: Representatives John S. Wood, Morgan M. Moulder, Donald L. Jackson, and Charles E. Potter.

Staff members present: Frank S. Tavenner, Jr., counsel; Thomas W. Beale, Sr., assistant counsel; Donald T. Appell

and Jackson Jones, investigators; and John W. Carrington, clerk.

Mr. Wood: Let the committee be in order.

Mr. Reporter, please let the record show that acting under authority of the resolution establishing the House Committee on Un-American Activities of the Seventy-ninth Congress of the United States, I have set up a subcommittee for the purpose of conducting the hearings in the Detroit area composed of the following members: Messrs. Moulder, Jackson, Potter, and Wood, who are all present.

The Committee on Un-American Activities of the House of Representatives from time to time has investigated un-American activities of fascism, nazism and other totalitarian "isms" designed to overthrow by force and violence the constitutional form of Government under which we live. It will be remembered that while this committee was engaged in the investigation of Nazi activities during the period of the Stalin-Hitler pact, the Communist Party was publicly supporting Hitler.

This committee has devoted much of its time in the [fol. 32] past few years to the subject of communism because communism is the only movement presently directed from abroad. The Communist conspiracy in many forms, including that of espionage by foreign agents, has been brought to light in investigations conducted by this committee. Communist infiltration into the entertainment, educational, governmental, labor, and other fields of endeavor has been exposed by this committee in its effort to carry out the duties imposed upon it by the Congress.

Investigation in the city of Baltimore, the State of Massachusetts, and other places has disclosed a concentration of Communist effort in certain defense areas of the country. It will be remembered that during the Massachusetts hearing, Herbert A. Philbrick detailed the method by which the Communist Party of Massachusetts used its members employed in industry to keep the national organization of the Communist Party and the international Communist movement fully advised of industrial potentialities in that area. There is no area of greater importance to the Nation as a whole, both in time of peace and in time of war, than the general area of Detroit which won the title, "The

Arsenal of Democracy." The purpose of this investigation is to determine first, whether there has been Communist activity in this vital defense area, and if so, the nature, extent, character and objects thereof.

Anticipating from our experience in other important investigations the smear campaign which will be directed [fol. 33] against this committee by the Communists' slander apparatus, I wish to clear up certain possible misconceptions at the outset.

It will be alleged by the Communists and their apologists that this committee is motivated by a desire to injure the labor movement. Nothing could be further from the truth as will be demonstrated by an impartial review of the investigations conducted by this committee over the past few years. The committee has succeeded to a marked degree in exposing Communist infiltration into certain labor unions, with the result in many instances that the unions involved rid themselves of Communist domination and influence. In other instances, local unions have endorsed and supported the committee's work. The committee is not interested in internal disputes within labor or in disputes between management and labor. It has a legislative duty to investigate and expose Communist activities and that is its purpose in appearing here.

You will also be told by the Communists and their fellow travelers that this committee is motivated by a desire to raise racial issues. This typical propaganda effort on the part of the Communists has been worn threadbare. They would have you forget that it was this committee which gave Jackie Robinson the opportunity to refute the statement made by Paul Robeson and to say to loyal Americans everywhere:

> "I and oth r Americans of many races and faiths have too much invested in our country's welfare, for any of [fol. 34] us to throw it away because of a siren song sung in bass. I am a religious man. Therefore, I cherish America where I am free to worship as I please, a privilege which some countries do not give. And I suspect that 999 out of almost any thousand colored Americans you meet will tell you the same thing."

The committee deplores exploitation of racial groups by the Communist Party. This committee believes in the basic integrity, character and loyalty of all Americans, regardless of race and creed and predicts there will be no questions as to the ultimate decision by Americans when informed of the true facts relating to the alleged Communist conspiracy in their midst.

I would like also at this time, before beginning the hearings, to make this announcement to the public:

We are here at the direction of the Congress of the United States, trying to discharge a duty and obligation that has been placed upon us by the Congress. Nobody who is present or who will be present in this room during the hearings, except the witnesses who are subpoenaed, are required to be here. You are here by the permission of the committee and not by any compulsion of the committee. This committee will not countenance any attempt or effort on the part of anybody to make any demonstration, either favorable or unfavorable, toward the committee's undertaking or to what any person called as a witness may have [fol. 35] to say."

Mr. Woods: I think that is far enough.

CHARLES E. POTTER, was thereupon recalled as a witness on behalf of the Government, and having been previously duly sworn, testified further as follows:

Direct examination (Continued).

By Mr. Woods:

Q. This is in sum and substance then the objectives of the committee hearings that were set for Detroit, as there read, as given by Chairman Wood?

A. That is right.

Q. On the 25th of February, 1952, is that correct?

A. The pertinent sentence there was "The purpose of this investigation is to determine, first, whether there has been communist action in the vital defense areas, and if so, the nature, extent, character and objects thereof."

Mr. Woods: I think that concludes all that the Government is interested in presenting out of the presence of the jury.

The Court: Is there any cross-examination of the witness with respect to the testimony offered out of the presence of the jury?

Mr. Goodman: I just have one question.

[fol. 36] Cross examination.

By Mr. Goodman:

Q. Senator Potter, will you turn to page 2743 of that document you have in front of you.

A. Yes.

Q. You were asked a question, I believe, with respect to Mr. O'Hair's testimony concerning Arthur McPhaul mentioned on that page. You do not know of your own personal knowledge, do you, that the Arthur McPhaul mentioned on that page was the defendant who is sitting here in this court room?

A. I know that the—.

Q. Can you answer that yes or no? Do you know of your own personal knowledge?

A. I can answer it this way, that the Arthur McPhaul that was—

Mr. Goodman: I think perhaps the Court should appreciate that that question can be answered, unless the witness does not know what his own personal knowledge was.

The Court: I think I will take the answer; and then if it is not responsive, I can strike it on motion.

Mr. Goodman: All right. Go ahead, sir.

A. No, I can not say for certain that the Arthur McPhaul who was mentioned by Mr. O'Hair was the Arthur McPhaul who is here today. However—

Mr. Goodman: That is all I want for my answer. The explanation that the witness wants to give, I think should be—

[fol. 37] The Witness: I shall be happy to answer it.

Mr. Woods: I shall be happy to ask him.

Mr. Goodman: I might object to it. But at least I do not desire any further explanation. That is all I want to know. That is all.

Redirect examination.

By Mr. Woods:

Q. If you have some further explanation to give in answer to that question, Senator, will you give it.

Mr. Goodman: I will object to a further explanation of my question, which was answered. If counsel has a question, I think he should ask it.

The Court: I think that is right.

Mr. Goodman: I might want to object.

By Mr. Woods:

Q. Is there any indication at all that this Arthur McPhaul enunciated by Mr. O'Hair is the same witness?

Mr. Goodman: And I will object to that on the ground that it constitutes either hearsay or a conclusion on the part of the witness.

The Court: No, he may answer that.

Mr. Woods: Now, we are at the point that I didn't open this door, Senator?

The Witness: Is the debate over, is the legal debate over, and I am to respond?

Mr. Woods: Yes. Go ahead.

A. Further on in the testimony, I believe when Mr. [fol. 38] McPhaul was on the stand, he was asked if he knew Mr. O'Hair, and I think at that time Mr. McPhaul refused to answer on the basis that his answer might tend to incriminate him.

The Court: Anything further?

Mr. Woods: No, sir.

Mr. Goodman: That is all. I have no further questions.

(Witness excused.)

* * * * * * *

(The following proceedings were had in the presence and hearing of the jury:)

Mr. Woods: I move for admission into evidence of Government's proposed exhibit 1, with the limitations agreed

upon by and between counsel for the defense and the Government, and ruled upon by the Court.

Mr. Goodman: I thought the court had already ruled.

The Court: I think I have already ruled.

Mr. Woods: All right.

The Court: It will be received subject to the conditions agreed upon by counsel.

Mr. Woods: We would move for the admission into evidence of heretofore marked Government's proposed exhibits 2 through 8 inclusive.

The Court: What are the numbers?

Mr. Woods: 2 through 8 inclusive,—2 through 7 inclu-
[fol. 39] sive.

The Court: Is there any objection?

Mr. Goodman: No objection.

The Court: They may be received.

Mr. Woods: I will now take them up with the witness.

Charles E. Potter, was thereupon recalled as a witness on behalf of the Government, and having been previously duly sworn, testified further as follows, in the presence and hearing of the jury:

Direct examination (Continued).

By Mr. Woods:

Q. Directing your attention to the 27th day of February, 1952, and Government's Exhibit No. 1, I will ask you if you recognize that as a printed copy of the transcript of the hearings conducted in Detroit, Michigan, on that date, at which you were present with the Congressmen heretofore mentioned by yourself?

A. That is correct.

Q. And does that transcript, as limited there, or marked, accurately describe the hearing that took place by the committee of the then witness, Arthur McPhaul?

A. Yes, it does.

Q. All right. Senator, I will then ask you to read, if you will, commencing at the beginning of the McPhaul testimony, on page 2870, over to roughly the middle of page

287, ending with "I will not," period, and no further. [fol. 40] Would you read that to the jury, please?

A. (Reading):

"Testimony of Arthur McPhaul, Accompanied by his Counsel, George W. Crockett, Jr.:

Mr. Wood: Mr. McPhaul, the committee has heretofore served upon you a subpoena duces tecum, to produce certain records and documents: Are you prepared to respond to that subpoena?

Mr. Crockett: May I suggest that the photographers be instructed to cease taking pictures, Mr. Chairman?

Mr. Wood: Does Mr. McPhaul object to the pictures? Is that your request?

Mr. McPhaul: That is right.

Mr. Wood: I will ask the photographers then to desist from taking further pictures. Will you answer my question, Mr. McPhaul. Are you prepared to produce the documents and papers that have been called upon for you to produce under the subpoena?

Mr. McPhaul: Mr. Wood, I refuse to answer this or any question which deals with the possession or custody of the books and records called for in the subpoena. I claim my privilege under the fifth amendment of the Constitution.

Mr. Wood: In view of that answer, Mr. Counsel, do you desire to proceed with the examination of this witness at this time?

Mr. Tavenner: I would like to ask the witness if he has [fol. 41] any other reason for refusing to produce the documents called for in the subpoena?

Mr. McPhaul: I think my answer covers it.

Mr. Tavenner: I would like to read the subpoena into the record, at least part of it, and introduce it. The subpoena calls for:

The appearance before the Committee on Un-American Activities or a duly authorized subcommittee thereof, from the House of Representatives of the United States, of which the Honorable John S. Wood is chairman, together with all records, correspondence, memoranda, pertaining to the organization of, the affiliation with other organizations and all moneys received or expended by the Civil

Rights Congress, Room 737 Federal Building, Detroit, Mich., Tuesday, February 26, 1952.

* * * * * * *

I desire to offer the subpoena in evidence, and ask that it be marked 'McPhaul Exhibit No. 1.'

Mr. Wood: It will be so marked and received.

(The document referred to was marked 'McPhaul Exhibit No. 1' and received in evidence.)

Mr. Wood: In order to complete the record, Mr. McPhaul, is it in response to this subpoena that has just been read that you now decline, for the reason you have stated, to produce the documents and books and records therein called for?

Mr. McPhaul: I have stated the reasons, for the record. [fol. 42] Mr. Wood: Is it in response to this subpoena that you refuse to answer?

Mr. McPhaul: That is my answer that I have just given.

Mr. Wood: To this subpoena?

Mr. McPhaul: To that subpoena; yes.

Mr. Wood: Now, the question I will ask counsel is, it is now 4:30. Do you desire to proceed with the examination of this witness at this time? If so, I will administer the oath to him.

Mr. Tavenner: Yes; let us proceed.

Mr. Wood: Will you please stand and be sworn. Do you solemnly swear that the evidence that you will give this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. McPhaul: I do.

Mr. Wood: Are you represented by counsel?

Mr. McPhaul: I am.

Mr. Wood: Will you identify yourself for the record, Counsel?

Mr. Crockett: My name is George W. Crockett, Jr., of the Michigan bar, and the United States Supreme Court bar. My office is located in the Cadillac Tower Building in the city of Detroit.

Mr. McPhaul: I have just handed each member of the committee a copy of a prepared statement. I also included a [fol. 43] petition. We charge Genocide, a crime of the Gov-

ernment against Negro people. That was presented to the United Nations a few weeks ago.

Mr. Wood: The committee has it in hand and it will be given due consideration. Just confine yourself here to the answering of the questions asked you and we will get along.

Mr. McPhaul: I just wanted to help by pointing out, if you will permit me to read certain things—

Mr. Woods: If we desire that sort of assistance, we will call on you for it.

Mr. Tavenner: Will you state your full name, please?

Mr. McPhaul: Arthur McPhaul.

Mr. Tavenner: Where were you born, Mr. McPhaul?

Mr. McPhaul: There is some question about where I was born. You being from Virginia, sir, you know, no doubt, in most of the southern states—

Mr. Wood: Will you just answer the question.

Mr. McPhaul: They just don't bother to make birth certificates.

Mr. Tavenner: No; I didn't have one myself.

Mr. Wood: Just give us your best understanding about it, if you do not know definitely. Can you approximate it? I did not have one, but I finally went back to the old family Bible and dug up one.

Mr. Tavenner: I asked a question of one witness on an [fol. 44] occasion of where she was born, and she started back at Jamestown. I really only want to know for the purpose of the record what your age is.

Mr. McPhaul: I think I was born in Oklahoma.

Mr. Tavenner: When?

Mr. McPhaul: 1909.

Mr. Tavenner: Mr. McPhaul, you are served with a subpoena by Mr. Sam O'Connell, deputy United States marshal, to appear before the committee on the 26th day of February 1952 and produce the records, correspondence and memoranda pertaining to the organization of and affiliation with other organizations and all moneys received and expended by the Civil Rights Congress, were you not?

Mr. McPhaul: Yes, I was served with a subpoena.

Mr. Tavenner: Do I understand that you refuse to produce any of the records directed to be produced under the subpoena?

Mr. McPhaul: I have answered that, Mr. Counsel.

Mr. Wood: You did not answer it under oath, and I think perhaps you will agree with me that it would be proper to do so under oath if you are asked.

Mr. McPhaul: I will repeat the answer I gave at the beginning.

Mr. Wood: Will that answer stand as your answer to the question just asked you?

[fol. 45] Mr. McPhaul: Will you repeat the question?

Mr. Tavenner: The question is as to whether or not you are refusing to produce the records directed to be produced under the subpoena?

Mr. McPhaul: My answer to that is, I refuse to answer this or any questions which deal with possession or custody of the books and records called for in this subpoena. I claim my privilege under the fifth amendment of the United States Constitution.

Mr. Tavenner: My question to you was not answered by that statement, in my judgment. My question was whether or not you are refusing to produce the records which you were directed to produce under this subpoena?

Mr. McPhaul: I have answered it in this statement.

Mr. Tavenner: No sir. You have stated that you refuse to answer any questions pertaining to them. I have not asked you a question that pertains to them. I have asked you to produce the records. Now, will you produce them?

Mr. McPhaul: I will not."

By Mr. Woods:

Q. Is the McPhaul in the court room today the same McPhaul who was before the hearing on the date heretofore named?

A. Yes.

Q. Who is Mr. Tavenner, by the way?

A. He was counsel of the full committee and counsel for the special subcommittee.

[fol. 46] Q. Turning to page 2874, I will ask you to read the marked portion thereon, questions by Mr. Tavenner and answers by Mr. McPhaul.

A. (Reading):

"Mr. Tavenner: Were you in this room during the testimony on Tuesday of Walter Scott Dunn?

Mr. McPhaul: You asked if I was in this court room on Tuesday?

Mr. Tavenner: No. Read the question (addressing official court reporter).

(The question was read by the official court reporter.)

Mr. McPhaul: My subpoena required that—

Mr. Wood: Never mind what your subpoena required. You were asked whether you were here at the time he testified. This is a simple question. Can't you answer it?

Mr. McPhaul: I was here in answer to the subpoena."

By Mr. Woods:

Q. The same Mr. McPhaul?

A. The same Mr. McPhaul.

Q. You have heard much talk about the subpoena heretofore. I will show you Government's Exhibit No. 2, and ask you what that is, Senator?

A. This is the regular subpoena that was used by the House Committee on Un-American Activities, signed by the chairman.

The Court: What is it?

A. It is the regular subpoena that was used by the House [fol. 47] Committee on Un-American Activities.

By Mr. Woods:

Q. And it is signed by whom?

A. It is signed by John Wood, chairman.

Mr. Woods: And Mr. Goodman, do you concede that this is the subpoena that was served upon Arthur McPhaul on the date indicated on the subpoena?

Mr. Goodman: We have already agreed to the reception of all those exhibits, that is, those excerpts.

Mr. Woods: All right.

Mr. Goodman: By the way, again I have no objection, if you want to read them instead of the witness.

Mr. Woods: All right. I will read from Government's Exhibit No. 2 for you:

This is the original subpoena:

"By authority of the House of Representatives of the Congress of the United States.

To: United States Marshal: You are hereby commanded to summon Arthur McPhaul, 252 East Palmer, Detroit, Michigan, to be and appear before the Committee on Un-American Activities or a duly authorized subcommittee thereof of the House of Representatives of the United States, of which the Honorable John S. Wood is chairman, together with all the records, correspondence and memoranda pertaining to the organization of the affiliation with other organizations, and all moneys received or expended by the Civil Rights Congress, in Room 737 Federal Building, [fol. 48] Detroit, Michigan, Tuesday, February 26, 1952, at the hour of 10 A. M., then and there to testify touching matters of inquiry committed to such committee, and he is not to depart without leave of said committee.

Herein fail not, and make return of this summons.

Witness my hand and seal of the House of Representatives of the United States, at the City of Washington this 15th day of February, 1952: John S. Wood, Chairman, Attested by Ralph R. Roberts, Clerk."

Duly noted on the back: "Served Arthur McPhaul at Detroit, Michigan, on this 18th day of February, 1952.

(Signed) Sam O'Connell, Deputy U. S. Marshal."

Mr. Woods: I will read to you Government's Exhibit 3:

"House Resolution 4.

In the House of Representatives, U. S.

January 3, 1951.

Resolved, that a message be sent to the Senate and inform that body that a quorum of the House of Representatives has assembled; that Sam Rayburn, a representative from the state of Texas has been elected speaker, and Ralph R. Roberts, a citizen of the state of Indiana, clerk of the House of Representatives, of the 82nd Congress.

Attest: Ralph R. Roberts, Clerk."

[fol. 49] Q. What is that document that bears that seal also, Senator?

A. That is the document that states that the new Congress has been formed; that the House of Representatives has been formed for beginning the new Congress. This is the official seal of the House of Representatives.

Mr. Woods: Government's Exhibit 4.

House Resolution 7.

House of Representatives, U. S.

January 3, 1951.

"Resolved, that the rules of the House of Representatives of the 81st Congress, together with all applicable provisions of the legislative reorganization act of 1946 be and they are hereby adopted as the rules of the House of Representatives of the 82nd Congress, with the following amendment included therein as a part hereof, to-wit:"

I will omit that as not being pertinent to our particular case.

Q. Tell us what this does?

A. This adopts the rules of the House of Representatives.

Mr. Woods: Now then, Government's Exhibit 5.

The Court: Of which Congress?

A. This was for the 82nd Congress.

Mr. Woods: This is on a letter type piece of paper. (Reading):

[fol. 50] "Office of the Clerk

House of Representatives, Washington, D. C.

Ralph R. Roberts, Clerk.

I, Ralph R. Roberts, Clerk of the House of Representatives, do hereby certify that the following Members constitute the Committee on Un-American Activities of the House of Representatives as is evidenced in the Journal of the House of Representatives of January 12, 1951 and January 15, 1951: John S. Wood, Chairman, of Georgia;

Francis E. Walter, of Pennsylvania; Morgan M. Moulder, of Missouri; Clyde Doyle, of California; James B. Frasier, Jr., of Tennessee; Harold H. Velde, of Illinois; Bernard W. (Pat) Kearney, of New York; Donald L. Jackson, of California, and Charles E. Potter, of Michigan.

In witness whereof I hereunto affix my name and the seal of the House of Representatives, in the City of Washington, District of Columbia, this first day of July anno Domini one thousand nine hundred and fifty-two.

Ralph R. Roberts, Clerk of the House of Representatives."

Q. I will ask you what that is?

A. That is the document that certifies the membership of the House Un-American Activities Committee of that Congress.

Mr. Woods: Defendant's Exhibit 6. (Reading):

[fol. 51] "Government's Exhibit 6.

H. Res. 717

In the House of Representatives, U. S.

June 30, 1952.

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Un-American Activities of the House of Representatives as to the refusal of Arthur McPhaul to answer questions before the said Committee on Un-American Activities, and as to the willful and deliberate refusal of Arthur McPhaul to produce all records, correspondence, and memoranda pertaining to the organization of the affiliation with other organizations, and all moneys received and expended by the Civil Rights Congress, before the said committee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the eastern district of the State of Michigan, to the end that the said Arthur McPhaul may be proceeded against in the manner and form provided by law.

Attest: Ralph R. Roberts, Clerk."

Q. What is that?

A. This is the resolution of the House of Representatives which certifies, which the House passes on, to approve the report of the committee which cited Mr. McPhaul for contempt.

Mr. Woods: (Reading):

[fol. 52] Government's Exhibit 7.

"Sam Rayburn, 4th District, Texas.

The Speaker's Rooms
House of Representatives, U. S.
Washington, D. C.

The United States Attorney
Eastern District of Michigan

The undersigned, the Speaker of the House of Representatives of the United States, pursuant to House Resolution 717, Eighty-second Congress, hereby certifies to you the refusal of Arthur McPhaul to testify and to produce certain records, correspondence, and memoranda, before the Committee on Un-American Activities of the House of Representatives in response to a subpoena duly served upon him by direction of the said committee, authorized by Public Law 601, Seventy-ninth Congress, as is fully shown by the certified copy of the report (House Report 2353) of said committee which is hereto attached.

Witness my hand and the seal of the House of Representatives of the United States, at the City of Washington, District of Columbia, this first day of July 1952.

Sam Rayburn, Speaker of the House of Representatives

Attest: Ralph R. Roberts, Clerk of the House of Representatives."

Q. Is that not the duly signed certification as such to the United States Attorney for the Eastern District of Michigan?

A. That is right.

[fol. 53] Q. Namely, our office?

A. Yes.

Mr. Woods: We will move at this time for the admission into evidence of Government's proposed exhibit No. 8, which is a further letter from the clerk of the House of Representatives, and also includes the House Report 2353 referred to in Government's Exhibit No. 7, if you will recall. And we will limit, in the reading of House Report 2353, we will limit it to the substance of the findings of the Committee. We have heretofore read the minutes in Exhibit No. 1, which is a transcript of the hearing of that date, and that will suffice for the balance of House Report 2353, which is merely repetitious of that.

The Court: Is there any objection?

Mr. Goodman: I think counsel and I agree as to what is to go in. The report here and the substance of the minutes of the meeting are to go in to the jury, just as they did with Government's Exhibit 1, except we agree that you do not have to read it again.

Mr. Woods: No.

The Court: All right. It will be so received.

Mr. Woods: Defendant's Exhibit 8, once again, is a letter.

The Court: Will you describe that again.

Mr. Woods: Government's proposed exhibit 8 is a letter and reads as follows. (Reading):

[fol. 54] Government's Exhibit 8.

"Ralph R. Roberts, Clerk.

Office of the Clerk
House of Representatives
Washington, D. C.

I, Ralph R. Roberts, Clerk of the House of Representatives, do hereby certify that the attached is a true and correct copy of House Report 2353 of the Eighty-second Congress, second session, as submitted to the House of Representatives June 30, 1952, by Mr. Wood, of Georgia, from the Committee on Un-American Activities and noted in the Journal of the House of Representatives of June 30, 1952, Eighty-second Congress, second session.

In witness whereof I hereunto affix my name and the seal of the House of Representatives in the City of Washington, District of Columbia, this first day of July anno Domini one thousand nine hundred and fifty-two.

Ralph R. Roberts, Clerk of the House of Representatives."

(Seal)

Attached thereto is a pamphlet reading:

"82d Congress 2d Session — House of Representatives — Report No. 2353

Proceedings Against Arthur McPhaul

June 30, 1952—Ordered to be printed.

Mr. Wood of Georgia, from the Committee on Un-[fol. 55] American Activities, submitted the following

Report Citing Arthur McPhaul.

The Committee on Un-American Activities as created and authorized by the House of Representatives through the enactment of Public Law 601, section 121, subsection (q)(2) of the Seventy-ninth Congress, and under House Resolution No. 7, of the Eighty-second Congress, caused to be issued a subpoena to Arthur McPhaul. Said subpoena required the said Arthur McPhaul to be and appear before the Committee on Un-American Activities of the House of Representatives of the United States, or a duly authorized subcommittee thereof, at room 737, Federal Building, Detroit, Mich., on Tuesday, February 26, 1952, at the hour of 10 a. m., to produce all records, correspondence, and memoranda pertaining to the organization of, the affiliation with other organizations, and all money received or expended by the Civil Rights Congress, and then and there to testify to matters of inquiry committed to the said committee and not to depart without leave of said committee. The subpoena served upon Arthur McPhaul is set forth in words and figures as follows:"

I will abstain from reading that. We have read that heretofore.

The Court: Is that what you have read from exhibit 1?

Mr. Woods: That has been read from exhibit 2, from the subpoena itself.

The Court: All right.

[fol. 56] Mr. Woods: And then carrying on the report 2353: (Reading):

"In compliance with the said subpoena, Arthur McPhaul appeared before a subcommittee of the said committee and the said subcommittee then and there demanded the production of said records, correspondence, and memoranda pertaining to the organization of, the affiliation with other organizations, and all moneys received or expended by the Civil Rights Congress, and the said Arthur McPhaul refused to produce the said records and documents and refused to answer all questions relating thereto. The said Arthur McPhaul having appeared as a witness and having been asked questions, namely:"

Now, you will recollect the Senator reading from exhibit No. 1, which was a transcript of the hearing.

Then after a recitation of that transcript of this testimony, which you have already heard, then the House Report 2353 continues as follows: (Reading):

"Because of the refusal of the said Arthur McPhaul to produce the said records, correspondence, and memoranda pertaining to the organization of, the affiliation with other organizations, and all moneys received or expended by the Civil Rights Congress, mentioned in the foregoing subpoena, the Committee on Un-American Activities has been deprived of the opportunity to inspect the same and of the evidence contained therein which your committee considers relevant to the subject matter, which, under Public Law [fol. 57] 601, section 121, subsection (q)(2) of the Seventy-ninth Congress and under House Resolution 7 of the Eighty-second Congress, the said committee was instructed to investigate; and because of the refusal of Arthur McPhaul to answer the foregoing questions, the said Committee on Un-American Activities was deprived of answers to pertinent questions propounded to said Arthur McPhaul relevant

to the subject matter, which, under Public Law 601, section 121, subsection (q)(2) of the Seventy-ninth Congress, and under House Resolution No. 7 of the Eighty-second Congress, the said committee was instructed to investigate; and the refusal of the witness to answer questions, namely:"—

And then quoting again, and once again referring to exhibit No. 1, which we have already read to you, which is a transcript of the hearings proper on February 27, before the Committee.

Following this recitation again, we carry on the reading, as follows: (Reading):

"Which questions were pertinent to the subject under inquiry and is a violation of the subpoena under which the witness had previously appeared. The wilful and deliberate refusal of Arthur McPhaul to produce the said records, correspondence, and memoranda pertaining to the organization of, the affiliation with other organizations, and all moneys received or expended by the Civil Rights Congress; and his refusal to answer the aforesaid questions, deprived your committee of necessary and pertinent testimony and places the said witness in contempt of the House of Repre- [fol. 58] sentatives of the United States."

By Mr. Woods:

Q. If you can enlarge on that, to clarify it, other than what we have already covered, please do so, Senator.

A. The document from which you read, entitled "Proceedings Against Arthur McPhaul" is a report which accompanied the resolution asking for the contempt citation on Arthur McPhaul for failure to produce the documents and answer questions. The report is always made by the committee for the benefit of the members of the House who vote on the resolution. This is a letter from the clerk of the House of Representatives, Mr. Roberts, with the official seal of the House attached to the letter, the letter of transmittal with the report.

Q. And the House Report 2353 itself is the report of the chairman of the committee to the House, who certifies that in this case McPhaul having been subpoenaed as he enumerated, did appear, and did refuse to produce the records, is that right?

A. That is right. The House votes to approve the report.

The Court: What was that?

A. The House votes to approve the report, the House votes to either approve or reject the report.

By Mr. Woods:

Q. And it did so, did it not?

A. It voted to approve the report.

The Court: And does that appear in the exhibit?

Mr. Woods: That, I think, appears in this other exhibit, doesn't it?

A. The other exhibit shows that the House did approve it, yes.

[fol. 59] The Court: You have the report here. And you say the report attached to exhibit 8, the letter from the clerk of the House is a report from the chairman of the House Committee on Un-American Activities?

A. It is a report of the official action of the House Committee on Un-American Activities of the House of Representatives, and the House then acts upon the report, to accept or reject the report. In this case they accept the report.

By Mr. Woods:

Q. And that is evidenced by exhibit 6 and 7, one of which, exhibit 6 is the House Resolution itself, and exhibit 7 is the formal certification of the United States Attorney by Mr. Rayburn, the Speaker of the House of Representatives, is that not correct?

A. That is correct.

* * * * * * *

Mr. Woods: And this will be exhibit 9.

(A document was marked Government's Exhibit 9.)

By Mr. Woods:

Q. Senator Potter, I will show you Government's proposed exhibit 9, and ask you if you can identify it? Don't tell me what is on it, but what is it; identify it, as to what it is?

A. This is on the letterhead of the Civil Rights Congress of Michigan, a letter signed by—

Mr. Goodman: Now, just a moment. I object to that, unless he knows who it was signed by, unless he knows of his own knowledge.

The Witness: How does counsel wish to have the letter identified?

[fol. 60] By Mr. Woods:

Q. Let me ask you, Senator, does this letter come from the official file and records, documents and memoranda that are in the possession of the House Committee on Un-American Activities?

A. Yes.

Q. As a matter of fact, it came through your and my request from Mr. Tavenner, the counsel for the committee, did it not?

A. That is right.

Q. Have you seen that letter before?

A. Whether it was this letter, I have seen letters of this same letterhead before.

Mr. Woods: I move for the admission of Government's proposed exhibit No. 9, to be restricted so as not to include any of the black typing that constitutes what we ordinarily term the body of the letter, and only to include the caption letterhead in blue ink, and the end signature thereon, which is in longhand, with a typewritten identification under it. Mr. Goodman, I do not know whether you have seen that before or not.

Mr. Goodman: No, I didn't. I have heard of it. I will object to Exhibit No. 9 on the ground that it is not shown to have any relationship to the defendant in this case. And it would not be admissible against this defendant on the basis of the testimony given in support of its introduction. Therefore I object to it.

The Court: I might ask the Government the purpose of offering this exhibit, exhibit 9.

Mr. Woods: Whatever additional—

The Court: I know, but for what purpose?

[fol. 61] Mr. Woods: For whatever additional aid and assistance or information this court and jury might need relative to any identification of this defendant. Whether or not Mr. Goodman phrases his objection, as to whether or not it has any relationship to this defendant, would strike the Government as going to a matter of his argument, as to the weight that is to be given to it, but certainly not as bearing upon its admissibility as a document belonging to and in the possession of the House Committee on Un-American Activities, especially when you consider the defendant here, the Civil Rights Congress whose books, documents and other memoranda were subpoenaed, and the denominations that are noted on the proposed exhibit itself.

As I understand the objection, the document itself does not establish the identity of this defendant. Is that the basis of your objection, or not?

Mr. Goodman: That is right. There is no showing that the defendant here is any person connected with that particular document; and therefore it could not be admissiblle against him in this case, to establish his guilt of this charge.

The Court: Is the Government offering this as bearing upon the question of the pertinency, as we have discussed that question here in court before? Or does it go to some other element of the case?

Mr. Woods: That is a question.

The Court: I will tell you what I will do; I will reserve my ruling on the admissibility of this exhibit. There is nothing more you care to develop from this witness with [fol. 62] respect to the admissibility of this exhibit, is there?

Mr. Woods: No sir, there is not.

The Court: Or if there is, you may ask any questions of that nature, and I will reserve my ruling as to the admissibility of this exhibit 9.

Mr. Woods: No, I think not.

The Court: All right.

Mr. Woods: I could not go any further.

The Court: You may proceed, then.

Mr. Woods: Mr. Goodman, your witness.

Mr. Goodman: I have no questions of the witness, your Honor.

The Court: All right, Senator, you are excused.

The Witness: Thank you.

* * * * * * *

Mr. Woods: I think that constitutes the Government's case.

The Court: Subject to the ruling of the Court on Exhibit 9.

Mr. Woods: Yes.

Mr. Goodman: If that constitutes the Government's case, the defendant will rest too. I would like to make a motion, your Honor, in the absence of the jury.

* * * * * * *

[fol. 63] DEFENDANT'S MOTION FOR DIRECTED VERDICT OF ACQUITTAL

Mr. Goodman: I would like to make a motion at this time for a directed verdict of not guilty.

My argument on the motion will be somewhat at loose ends, because of your Honor's failure to rule on the admissibility of this one instrument.

The Court: That was one reason I mentioned that. You mean that Exhibit 9?

Mr. Goodman: Yes.

The Court: That was why I mentioned that. I have not ruled on that.

Mr. Goodman: I can make my argument subject to your ruling, except as that might affect the case somewhat. I do not know whether it would or not. Perhaps your Honor wants to rule on the admissibility of that now.

The Court: I wonder if I shouldn't rule on it before you make your motion. Perhaps I should. It would be better, perhaps, because you should know, probably, in making your argument, and in submitting your motion.

Mr. Goodman: My argument would be a little bit vague, I am afraid, unless I know what your Honor's ruling is on that.

The Court: I am a little vague as to how to rule until the Government decides the purpose for which they are offering it. I think, if you want to consider this over night, the court is willing to let you do that.

[fol. 64] Mr. Woods: It might take me all night to figure out an answer to that question.

Mr. Goodman: I think, on the question of pertinency, if counsel needs any more evidence to support that issue, I do not know that I would have any objection to having it considered by the court on a separate record outside of the jury for that purpose.

Mr. Woods: I am not interested in that being submitted in camera.

Mr. Goodman: Not in camera merely.

Mr. Woods: Or outside of the presence of the jury.

Mr. Goodman: As to the issue of pertinency. But if counsel seeks to introduce it for other purposes, I think he ought to state what those purposes are; and I do not see how it can be offered for such other purposes.

Mr. Woods: I think if I took a little more time I would probably come up with the same answer that I indicated here before. Here we have a document which is a part of the files and documents of the House Committee on Un-American Activities, kept by that committee, and it bears the letterhead of the Civil Rights Congress, with Arthur McPhaul being denominated on the letterhead as the executive secretary; and the second page bears his signature, the signature of Arthur McPhaul as executive secretary. The body and substance of the letter, we are not interested in that at all. But nonetheless, that document bears the date, as I recall it, of February 16, 1952.

Now then, we have here a defendant by the name of [fol. 65] Arthur McPhaul who has been cited by the Congress of the United States for contempt of Congress in that he did wilfully persist in his refusal to produce books, documents, records, correspondence of the Civil Rights Congress; and on February 26, 1952, some ten days after the date of this letter.

Now, whether or not the Arthur McPhaul at the hearing is the same Arthur McPhaul as indicated by the signature on this proposed exhibit No. 9, could only, I imagine, be shown by about one of two ways; No. 1, his admission, which we certainly haven't got; we would have to take it if we could get it, but we haven't got it, and we are not going to get it; or, No. 2, somebody else to identify him as being that person.

Now, we could stand here from now until next Christmas and call every present member of the Civil Rights Congress, if there is such an organization, or every past known member of the Civil Rights Congress, to testify to whether or not that McPhaul and the one at the hearing were one and the same person; and we would undoubtedly, I am satisfied, never get an answer.

But does that necessarily foreclose the Government from showing in such a manner as it can the possible identification of the Arthur McPhaul at the hearing as the Arthur McPhaul denominated on the letterhead of the Civil Rights Congress? We think not.

The admissibility of the document which is in possession of the House Un-American Activities Committee conducting this investigation subpoenaed Arthur McPhaul to appear at a given date to produce certain records, is something entirely separate and distinct from the weight that [fol. 66] should be attached to that document once it is admitted into evidence. And if Mr. Goodman wishes to argue to the jury that the Government has fallen on its face and has failed to prove in an unequivocated manner that they are in fact one and the same, that would seem to be his prerogative. But such aid and assistance and information as the jury might or might not take from that document certainly should be made available to it, we feel, for whatever aid and assistance it might be to them.

For that reason we think it is admissible for the benefit of the jury.

The Court: As I understand it, counsel seem to agree that the pertinency of the issuance of the subpoena, whether or not that is pertinent to the scope of the inquiry of the committee is a legal question for the court to decide.

Mr. Woods: It is for you to decide.

The Court: Now, doesn't this exhibit bear only on that phase of the case? What broader scope could it have?

Mr. Woods: Well, I must confess that certainly I have to stand here and play on a highly technical argument, your Honor, when I see considerable merit to it.

The Court: But you see, Mr. Goodman's objection is that there is no proof here that this relates to the defendant here. You have a name, the same name. And of course, in

offering evidence substantive evidence to prove the offense charged, it certainly would have to be connected up, wouldn't it, I should think, in some way with the defendant. And lacking that, how could that be admissible as substan- [fol. 67] tive proof of the offense for the jury to consider, as bearing upon any of the elements of the case that the jury must decide as a question of fact.

Mr. Woods: It seems to me that that gets to those elements that the jury has to decide as questions of fact. I would be interested in Mr. Goodman's answer then as to what he feels that the jury has to decide as questions of fact. The question of what he claims they have to decide as a question of fact may well resolve me on this question as to this exhibit.

The Court: Well, as I understand it, counsel seem to agree that the jury here are not to decide as a question of fact whether the subpoena issued is pertinent to or relevant to the scope of the inquiry of the committee, is that right?

Mr. Woods: That is right.

Mr. Goodman: I agree with Mr. Wood on that.

The Court: All right. Now, if that is a question of law for the court to decide, then why is this document admissible for the jury?

Mr. Woods: Let us answer this other question first, then: What fact issues then does Mr. Goodman presently feel are before the jury for them to consider, fact issues?

The Court: I do not know yet what he says about that.

Mr. Goodman: I am going to argue later on in my motion my view of the evidence that will support my contention. I thought we were going to try to dispose of this exhibit first.

The Court: I think I should, probably. Well, I have [fol. 68] indicated pretty well how I feel about this.

Mr. Woods: I think you have.

The Court: I think I will sustain the objection, the defendant's objection to exhibit 9, as evidence before the jury. Now, I understand Mr. Goodman has no objection to that being received in evidence within the scope offered, to be considered by the court as bearing upon the issue of pertinency, is that right?

Mr. Goodman: That is right, with the understanding that I do not agree in any respect that the person who is named on that letterhead and whose signature appears thereon is the defendant.

The Court: I understand that.

Mr. Goodman: I have no objection for that purpose, your Honor.

The Court: Well, I will receive it in evidence subject to that restriction.

Mr. Woods: All right.

The Court: I will receive it as some evidence for this court to consider as bearing upon the element of pertinency, as we have discussed that word here several times.

Mr. Woods: With the view in mind that if this goes on appeal that there might be more than one issue for the Court of Appeals to pass upon then. We would like to make it possible, and it would be possible then to open that line of inquiry in the Court of Appeals by registering our objection to the court's ruling as to the limitation on that.

The Court: Yes, you may have an exception to the rul-[fol. 69] ing of the court.

Mr. Woods: All right.

The Court: And use that; in event of an appeal you may have the right to use that as a basis for objection.

Mr. Woods: Thank you.

* * * * * * *

The Court: All right. You may proceed.

Mr. Goodman: The first point I want to make at this time, without restating all of the contents af the motion to dismiss that I have filed earlier, and which the court has denied, and they relate to the legality and constitutionality of the identity and the indictment on its face.

The Court: Well, there is a motion to dismiss in writing.

Mr. Goodman: Yes. I do not know whether it is necessary.

The Court: There is a motion to dismiss in writing.

Mr. Goodman: Yes. I want to renew that motion. But I see no point in making the argument again. I just want the record to be clear that I do maintain the position taken in the motion, for the reasons therein stated.

Now, in addition to that, however, we take the view that on the basis of the testimony offered in support of the indictment, that the Government has failed to prove its case.

Now, as to what the Government has to prove, in my view the Government must prove several things. First, they must prove that a subpoena was properly issued by a duly constituted committee of Congress to the defendant and was served upon him. Subject to the objections that I [fol. 70] have made in my motion to dismiss earlier, which the court has overruled, I think, however, the Government has produced evidence in this case from which the court may find, or the jury may find, that Congress did authorize the committee which issued a subpoena which was served upon the defendant, on the basis of which he did appear before this particular committee. I think also it must be shown as a part of the Government's case that the issuance of the subpoena related to the objectives and powers of this committee were authorized by Congress. And then I think that there is sufficient evidence in the record—

The Court: What was your second point? What was that point, that it requires proof of what?

Mr. Goodman: That the committee issued the subpoena in connection with the authorized purposes of its objectives as set forth by Congress in the resolution establishing the committee; that is, the issue of jurisdiction of the committee to have issued the subpoena directed to this particular defendant, as we have talked about it as a matter of pertinency. I think there is sufficient evidence in the record from which the court could conclude that the subpoena was issued pursuant to the statute authorizing it to function.

Now, in addition to that, however, I think the Government also has to prove several other things. First, I think it has to prove that the particular records which were subpoenaed were pertinent to the investigation. This is in addition to the argument we have already made on the motion that the subpoena is too broad for any purpose, and constitutes an illegal search and seizure, although I think the court should [fol. 71] consider that in relation to my present motion, even though I made it as a part of the motion to dismiss. And I do not think there is any proof here to show that the records which they sought, that is, the books and records

of the Civil Rights Congress and all of its receipts and disbursements, without time, and without limit as to place or time, were pertinent to the investigation.

There is a showing from which I think the court might find that it could investigate the Civil Rights Congress. But where is the showing that these particular records were pertinent to that investigation? And if there is any such showing, where is the justification for the issuance of a subpoena as broad and as all-inclusive as this one?

In support of that proposition I refer the court to the authorities that I have already listed in my brief in support of the motion to dismiss dealing with illegal searches and seizure, and the broad and inclusive nature of this particular type of a subpoena issued to an organization called the Civil Rights Congress, without regard to any particular place or time, but absolutely as broad as it possibly could be.

The next thing I think the Government has to prove is that such records as were enumerated in the subpoena were actually in existence. I think this is a part of the Government's proof; and I also believe that the Government must prove as a part of its case that the defendant had either possession or control of such records, if in fact they did exist.

Now, as to those two matters, which can be considered together, I believe, as the cases consider them together, that [fol. 72] is, proof of the existence of the records, and proof that the defendant had possession or control, as part of the Government's case which it must establish, I do not think there is any evidence in this record established from which a jury might even infer that there were any such records. There just is no showing at all. And secondly, I do not think there is any competent evidence from which the jury can find the defendant in this case ever had either possession or control of those records.

* * * * * * * * *

The final point that the jury has to decide, I would say, is that the defendant wilfully refused to turn over these records which he had possession and control of. Of course, the wilfulness is a matter for the jury to determine.

I presume that if the Government has proven all of the other elements of its case, that there is, of course, sufficient to go to the jury, and that would be purely the function of the jury, to determine the question of wilfulness. I do not contend that that issue can not be submitted to the jury. But I do say that the jury can not even reach that issue unless there is some evidence from which they can first find that the defendant had possession and control of documents which were actually in existence at or near the time when the subpoena was actually issued and served upon him.

. . . . . .

[fol. 73] Afternoon Session.

2 o'clock P. M.
Wednesday, December 19, 1956

OPINION OF THE COURT DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT

The Court: Yesterday, before court recessed, Mr. Goodman made a motion for a directed verdict of acquittal, and assigned his reasons in support of the motion and cited certain authorities. The court has considered the motion and the authorities, and I would like to ask Mr. Goodman now if he cares to argue his motion further?

Mr. Goodman: Your Honor, in view of the fact that we had a rather lengthy discussion, Mr. Woods, yourself and myself, in the conference room, at which time I presented the argument that I would have presented in court, I feel it unnecessary to say anything further to your Honor.

I do want to clarify a part of my motion that I am not sure at this time that I made clear at the time, and that is that while I did concede that there was sufficient evidence from which your Honor could find as a matter of law that the committee had jurisdiction over the subject-matter, I do not believe that there is any evidence from which the court may conclude that the documents sought in the subpoena were pertinent to the inquiry; and I want it clear, as a part of my motion for a directed verdict, that I do take the position that there is no evidence to show that the

documents mentioned in the subpoena were pertinent to the inquiry.

[fol. 74] The Court: Well, I understood from the statement you made yesterday in support of your motion that that was about what you said yesterday. I may have misunderstood you.

Mr. Goodman: I just wanted to clarify that.

The Court: You do concede that there is some evidence here that the committee had jurisdiction over the subject-matter?

Mr. Goodman: Yes, I do, your Honor.

The Court: But you do not concede that the particular documents requested in the subpoena were pertinent?

Mr. Goodman: No.

The Court: All right. Mr. Woods, do you care to argue this motion?

Mr. Woods: No. As Mr. Goodman indicated, we had the benefit of a lengthy and detailed conference with your Honor in chambers, at which time all of these matters were discussed, at which time further the Government stated that it would rely principally upon the opinion of Justice Vinson in the Fleischman case, and I feel that there is nothing further that we need to argue at this time formally.

The Court: All right. As counsel have already indicated, the Court spent all of the morning, a substantial part of the morning, an hour and a half or two hours of the morning, discussing the law with respect to the motion, and also in discussing with counsel their respective requests to charge. I have advised counsel which ones I will give and which ones I will not give. Before I conclude I will specify on the record, so that counsel will know before we proceed with the arguments.

[fol. 75] Mr. Goodman, in connection with his motion, first of all renewed the motion which he made earlier in this case to dismiss the indictment, and assigned certain reasons in support of that motion, and includes in this motion all of the grounds set forth in the motion to dismiss the indictment which was filed in this case on February 1, 1956. Briefs were filed in support of that motion, and also against the motion by the Government; and the court in an opinion from the bench denied that motion on April 30, 1956. The

court has again considered all of the grounds stated in connection with the motion to dismiss the indictment, which motion was previously denied, and the court is of the opinion that the denial of that motion was in accordance with the law; and therefore with respect to the grounds set forth in the motion to dismiss the indictment, the court finds against the defendant on those grounds, for the reasons set forth in the opinion stated here in court, which is also a part of the record in this case.

The defendant further claims, in support of his motion for a directed verdict, that the Government has failed to prove its case, and claims that there are certain things the Government must prove, as to some of which there is some testimony to support, and as to some of which there is not. That is the claim of the defendant.

Now, first of all, as I understand it, it was contended that the Government must prove that the subpoena was properly issued by a duly constituted committee of Congress. As to that, I think Mr. Goodman conceded that there was some evidence, some proof offered in support of that; and therefore, as to that ground the court feels likewise, that there [fol. 76] is some evidence to establish that ground. As a matter of fact, the court will charge the jury, as a matter of law, that the un-American Activities Committee of the 82nd Congress was duly constituted; and as to whether or not the subpoena was properly issued, the court feels that there is some evidence to support that.

The second ground is that if it is a question of whether or not the committee issued the subpoena in connection with authorized purposes and objectives, and it involves a question of whether the committee had jurisdiction to issue the subpoena. I think Mr. Goodman concedes there is some testimony that establishes this element of the case, and the court feels likewise. I think it is sufficiently established here that the court would have to charge the jury, as a matter of law, that the committee had jurisdiction to issue the subpoena in question.

As a further ground, it is contended that the particular records subpoenaed here,—I will put it this way: The defendant claims it was incumbent upon the Government to prove that the particular records subpoenaed here were

pertinent to the investigation, and that no proof was submitted here to establish this element.

The court takes into consideration the testimony of the Government's witness, Senator Potter, and also the testimony from the transcript of the proceedings before the subcommittee, which is Government's exhibit 1, excerpts from those proceedings, and concludes that there is sufficient testimony to establish that the records were pertinent to or relevant to the investigation which the House of Representa-
[fol. 77] tives was conducting in respect to the subject-matter of this suit, the Civil Rights Congress. Counsel have conceded that that is a question of law, and the court having ruled that the subject-matter of the subpoena, the records and documents requested and designated therein, were pertinent to the particular investigation.

That leaves two other matters that are assigned in support of the motion, which are related matters, to the effect that there is no proof that the records enumerated in the subpoena were actually in existence, or that the defendant had possession or control of the records if they did exist. That has been a more troublesome question. Mr. Goodman relies largely on the case of U. S. vs. Patterson, 219 Fed. 2nd, 659, and the case of Traub vs. U. S., 232 Fed. 2nd, 43. The court has read these cases, and feels that they do not support the defendant in his contention with respect to this matter. As a matter of fact, the factual situations involved in both of those cases are different than the situation before the court.

In disposing of these related grounds for the motion, the court directs the attention of counsel to the case of U. S. vs. Bryan, 339 U. S., at page 323, which is one of the cases Mr. Goodman also cited in support of his motion, and the case of U. S. vs. Fleischman, in the same volume of the United States Reports, page 349, which case has been cited and relied upon by both parties.

Mr. Goodman: Your Honor, I did not rely upon Bryan.

* * * * * * *

The Court: Perhaps you didn't rely on it, but you cited the case. And after reading it, I was wondering why you
[fol. 78] were relying on it. I understand then that you are not relying on it. In that case the court feels it is a particularly pertinent case to the issues here. The defendant there

was the executive secretary, and he had custody of the records of an association which was under investigation by the Committee on un-American Activities of the House of Representatives. The committee issued and served upon the respondent a subpoena directing the defendant to produce before the committee specified records of the association. The defendant appeared before the committee but refused to produce the records. In that respect the case is very similar to the case before the court here. But in that case the defendant refused to produce the records on the ground that the committee was without constitutional right to demand that, and failed to specify wherein the committee was without a constitutional right, and did not elaborate further upon that contention.

Now, in all fairness to the defendant here, in that case the testimony showed that the defendant did have the custody and control of the records. However, the broad principle involved there the court feels is especially applicable here, because the defendant in appearing before the committee,—or, to put it this way, the defendant at the trial of the case offered as a defense that the committee did not then have a quorum, and was not a lawful acting committee, and did not state that ground at the time she appeared before the committee as a reason for not producing the records. In the opinion the Chief Justice said this: "Testimonial compulsion is an intensely practical matter. If, therefore, a witness seeks to excuse a default on grounds of inability to comply with the subpoena, we think the defense must fail in the absence of even a modicum [fol. 79] of good faith in responding to the subpoena. That such was the situation in this case does not admit of doubt. In the first place, if respondent had legitimate reason for failing to produce the records of the association, a decent respect for the House of Representatives, by whose authority the subpoena was issued, would have required that she state her reasons for non-compliance upon the return of the writ."

I am quoting there from the case of U. S. vs. Bryan, if I did not make it clear, on page 332 of the opinion.

In the Fleischman case, in the same volume, 339 U. S., at page 349, it grows out of exactly the same situation; it was the same organization and substantially the same peo-

ple involved. But the Fleischman case involves a proceeding against one of the members of the Board of Directors, I think it was, or one of the members of the executive board of the association. As a matter of fact, all members of the executive board of the association were subpoenaed and requested to produce records, and they appeared with a prepared statement to the effect that they did not have possession, each one of them had a prepared statement that they did not have possession of the records and that they were in the possession of Helen Bryan; she was the defendant in the Bryan case just referred to. This defendant Fleischman took the position that she was not competent to act without a meeting of the full committee which could authorize her to act. That was her position, in substance, I believe. In any event, the court, in the course of that opinion, in passing upon whether or not the defendant there was properly found guilty, refers to the opinion of Mr. Justice Cardozo in the case of Morrison vs. California, 291 U. S., [fol. 80] 82-89, where Mr. Justice Cardozo said this:

"The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse and explanation, or at least upon a balancing of convenience, or the opportunities for the shifting of the burden will be found to be an aid for the accuser without subjecting the accused to hardship or oppression."

Then it goes on to say:

"For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance. Or if this at times be lacking, there must be in any event a manifest disparity in convenience or proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception."

Then Mr. Justice Vinson, after quoting from the opinion in that case, goes on to say:

"In this situation, manifestly, the prosecution is under a serious practical handicap if it must prove the negative proposition—that respondent did not or had no good reason [fol. 81] for failing to comply with the subpoena insofar as she was able. The possibilities of time and circumstance are of such side range as to defy inclusive rebuttal. On the other hand, the burden of the affirmative was not an oppressive one for respondent to undertake; the relevant facts are peculiarly within her knowledge. She was called upon merely to introduce evidence as to what steps she took after receiving the subpoena, or, if she took no action, any evidence tending to excuse her omission. Respondent does not lose the presumption of innocence that surrounds the defendant in a criminal prosecution. That presumption continues to operate until overcome by proof of guilt beyond a reasonable doubt and is not to be confused with burden of proof, which is a rule affecting merely the time and manner of proof."

Then the court goes on further to say:

"Even though we assume, therefore, contrary to the reasonable inferences to be drawn from respondent's statements before the Committee, that she may have made some effort to bring about compliance with the subpoena, or had some excuse for failing to do so, we think that under the circumstances here presented the burden was upon her to present evidence to sustain such a defense. And, in the absence of such evidence, we conclude that the evidence [fol. 82] adduced by the Government amply sustains the conviction. Respondent is no more or less guilty than any other member of the board. If she can escape prosecution by remaining quiescent, so can all others."

And in conclusion, the court says:

"A subpoena is a sterile document if its orders may be flouted with impunity."

Now, I think that language and the language in the Bryan case is particularly pertinent to the case here before this court. Here we have, according to the testimony submitted, the fact that the defendant in this case appears before the

subcommittee, as ordered by the subpoena, and is asked in substance whether he has the documents or is prepared to produce the documents in question as mentioned in the subpoena. At first he says he refuses to answer this or any question. That goes on over a number of questions, and there is sparring and failure to answer the question, you might say. After what appears here to be about two pages of printed transcript of those proceedings, the counsel for the committee finally asked this question: The question, directed to the defendant here:

"You have stated that you refuse to answer any question pertaining to them."

That means the records.

"I have not asked you a question that pertains to them. I have asked you to produce the records. Now, will you produce them?

[fol. 83] By Mr. McPhaul:

"A. I will not."

This court feels that that is an absolute refusal to produce the records. At least, it is testimony from which this court feels an inference may be drawn that this defendant did have the records under his custody or in his possession, and nevertheless refused to produce them.

Applying the decision in the Bryan and the Fleischman cases, this court feels that the defendant now, abiding his time, comes into court here and offers as a possible defense, or does claim as a defense that there is no proof that these records were in existence or that he had possession or custody of these records, or matters that he should have presented to the sub-committee when he appeared before that committee, and not have raised this defense or made this explanation, or rather have raised this issue. Rather than having raised it before the sub-committee, he waits until he comes into court and has a defense, and offers it as a defense in this case. The court feels that he cannot do that; that he should have given the sub-committee an opportunity to have explored these matters further at that time by

questions or otherwise; and that not to have made such an explanation before the sub-committee at the time he appeared does not entitle him now to raise these matters by way of defense in this case.

So, as to those reasons, the court also holds against the defendant, that it is not incumbent, in view of the record in this case, upon the Government to prove that the records were actually in existence or that the defendant had possession and control of the records.

Then, lastly, it is urged that the element of wilfulness is [fol. 84] also an element in this case. I have forgotten whether counsel said there is no proof; I guess he didn't; I think he said that maybe there is some proof.

Mr. Goodman: That is an issue before the jury.

The Court: I guess that is right.

Mr. Goodman: I said if the court decided the other matters against me, I would concede that would be an issue for the jury.

The Court: Yes, I guess that is right. So the court agrees with Mr. Goodman with respect to that element, of whether the defendant wilfully failed to produce the records is a question for the jury. So, as a matter of fact, there will be very few elements here to be decided by the jury, in view of the ruling of the court on motion, for the grounds here assigned in support of the motion.

In any event, the motion for a directed verdict of acquittal is denied, for the reasons the court has just given.

(Out of the presence of the jury):

The Court: Counsel has submitted certain requests to charge. As I have already indicated, I have gone over these with counsel, one by one, and I have informed counsel in chambers of my intentions, which of these I will give and which I will not give. But for the sake of the record, I will take up defendant's requests to charge now, and inform the defendant that I will not give his requests 1, 2, 3, 4 and 6. Request No. 1 I will not give because the defendant has withdrawn that request. Request No. 7, as amended by the defendant in deleting the last sentence, the Court will give, [fol. 85] which is a one-sentence request.

Now, as to the Government's requests to charge, I will just say I will not give those requests in the form they are stated. The Court will give certain parts of those requests in substance. And I might say I will probably give all of the requests in substance, but not in the form they are there stated; and that applies to the term "wilful" as well as the rest of it, although the Court will give an instruction on what is meant by the term "wilfully" in the statute and in the indictment; and it would be in substance as the Government has requested.

Now, is there anything else, gentlemen, to be taken up before I bring in the jury, and we will now proceed with the arguments?

Mr. Woods: I have nothing else.

The Court: Mr. Goodman?

Mr. Goodman: No, your Honor.

The Court: All right, bring in the jury.

. . . . . .

(The final arguments to the jury were then presented by counsel for the respective parties.)

Charge to the Jury

The Court: Ladies and gentlemen of the jury, we have finally reached the point in this case where you will listen to the charge of the court with respect to the law applicable to this case.

This is a criminal case based on an indictment wherein the United States of America, which I shall refer to as the Government in these instructions, is the plaintiff, and Arthur McPhaul is the defendant. The indictment reads [fol. 86] as follows:

"The grand jury charges, pursuant to public law 601, Sec. 121, sub-section 22 of the 79th Congress, and under House Resolution No. 7 of the 82nd Congress, the House of Representatives was empowered to and did create a Committee on Un-American Activities having duties and powers as set forth in said public law. Arthur McPhaul having been summoned as a witness by the authority of the House of Representatives of the United States by a subpoena served

upon him on February 18, 1952, to produce before said committee or a duly authorized subcommittee records upon the matter under inquiry before the said Committee, that is, to produce documents of the Civil Rights Congress relating to (a) all records, correspondence and memoranda pertaining to the organization of, and (b) the affiliation with other organizations, and (c) all moneys received or expended by the Civil Rights Congress. Arthur McPhaul appeared before the said Committee or a duly authorized subcommittee thereof on February 27, 1952, at Detroit, Michigan, in the Eastern District of Michigan, Southern Division, but did then and there fail and refuse to produce said records, and thereby did wilfully make default, in violation of Sec. 192 United States Code, Title 2, and Sec. 194, United States Code, Title 2."

[fol. 87] The fact that an indictment has been returned is not evidence and is not to be considered by you in any way as raising a presumption of guilt or creating any predudice against the defendant. An indictment is simply a form or method prescribed by law for preferring a criminal charge against a person, and must be regarded by you in that light only.

Any person charged with the commission of a criminal offense, under the laws of the United States, as is the defendant in this case, at the outset is presumed to be innocent, and this presumption of innocence remains with him throughout the entire trial of the case and during your jury deliberations, unless and until you are satisfied that the Government has overcome that presumption by competent evidence establishing the guilt of the defendant beyond a reasonable doubt.

The burden of proving the offense charged in the indictment in this case, and every essential element of such offense, is upon the Government to prove by competent evidence that convinces you beyond a reasonable doubt. If you believe from the evidence that the defendant is innocent, or if you believe that the Government has not proved each and every element of the crime beyond a reasonable doubt, you must return a verdict of not guilty.

A reasonable doubt is a doubt based upon reason and common sense, a doubt for which a reason can be a signed,

growing out of the testimony or lack of testimony in the case, a doubt which would cause you to hesitate in the ordinary affairs of life. A reasonable doubt is not an imaginary, fanciful, captious or speculative doubt. It is a doubt that appeals to the common sense of reasonable men [fol. 88] and women. To put it another way, if, after a careful consideration of all the evidence in the case, you do not have an abiding conviction to a moral certainty of the guilt of the defendant, then you are not convinced beyond a reasonable doubt, and it is your duty to render a verdict of not guilty. But, if you do have an abiding conviction to a moral certainty of the defendant's guilt, then you are convinced beyond a reasonable doubt, and it is your duty to render a verdict of guilty.

You as jurors are the sole judges of the facts in this case. The Court has not intended by reason of anything he may have said or done in the trial of the case to express any opinion upon the facts. On the other hand, the Court is the sole judge of the law in the case, and it is your duty to accept and apply the law as it is given to you by the Court regardless of whether you feel the law is good or bad. This case must be decided by you upon the evidence considered in the light of these instructions as to the law given to you by the Court.

Section 192, Title 2, United States Code, the statute under which the criminal offense charged in this indictment is brought, insofar as pertinent to this case, reads as follows:

"Every person who having been summoned as a witness by the authority of either house of Congress to produce papers upon any matter under inquiry before either house, or any committee of either house of Congress, wilfully makes default, shall be deemed guilty," etc.

The essential elements of the offense charged in the indictment, which the Government must prove by evidence [fol. 89] which convinces you beyond a reasonable doubt in order to establish the guilt of the defendant, are as follows: (1) That the defendant was summoned as a witness by means of a subpoena served upon him to produce certain records and documents of the Civil Rights Congress before the Committee on Un-American Activities of the House of Representatives of the United States, or a duly authorized

subcommittee of such committee; (2) that the defendant was so summoned as such witness by the authority of the House of Representatives of the United States; (3) that the records and documents of the said Civil Rights Congress which the defendant was directed to produce before such committee, or subcommittee thereof, by said subpoena were pertinent to a matter under inquiry before the House of Representatives of the United States; (4) that the defendant appeared before said committee, or a duly authorized subcommittee thereof, at Detroit, Michigan, on February 27, 1952; and (5) that the defendant did then and there wilfully fail and refuse to produce such records and documents before said committee or subcommittee.

I charge you, as a matter of law, that the Committee on Un-American Activities of the House of Representatives of the 82nd Congress of the United States was a validly constituted committee of such Congress on February 18, 1952, the date the subpoena was allegedly served on the defendant, and also on February 27, 1952, the date the defendant allegedly appeared before the subcommittee of such Un-American Activities Committee in Detroit, Michigan. I also charge you, as a matter of law, that such committee was acting within the scope of its authority in investigating the affairs of the Civil Rights Congress designated in the sub-
[fol. 90] poena in question and that the records and documents of the said Civil Rights Congress designated in the said subpoena were pertinent to a matter then under inquiry before the House of Representatives of the United States. I also charge you, as a matter of law, that the House of Representatives of the United States, acting through the said Un-American Activities Committee thereof, was authorized to summon the defendant as a witness by means of a subpoena to appear before the said Committee, or a subcommittee thereof, and to produce the records and documents of the said Civil Rights Congress before such Committee or subcommittee.

I also charge you that the word "wilful", as used in the statute, Section 192, Title 2, United States Code, which I have just read to you, and also in these instructions, with respect to one of the elements of the offense alleged in the indictment, means only that the alleged refusal or failure to

comply with the subpoena to produce the designated records was deliberate and not a mere inadvertence or accident. The word "default", as used in the said statute, simply means the failure to comply with the subpoena.

If you find from the evidence in this case, and beyond a reasonable doubt, that the defendant appeared before the said subcommittee, and then refused or failed to make any explanation with respect to the existence of the records designated in the subpoena, or with respect to whether or not such records were under his possession or control, I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because if the defendant had legiti-
[fol. 91] mate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said subcommittee.

I also charge you that the defendant is not excused from compliance with or producing the records designated in the subpoena merely because he is not designated as an officer or agent of the Civil Rights Congress therein; and neither is the defendant excused from such compliance with the said subpoena merely because of any lack of proof of any connection between the defendant and the Civil Rights Congress.

Defendant's counsel has stated in his argument to you that the court has ruled that there is only one issue for you to decide in this case, namely, whether the defendant wilfully made default, or, more specifically, whether the defendant wilfully failed to produce the records designated in the subpoena. Actually, the ruling of the court does not so limit matters for you to consider in this case, because, in addition to the question of whether the defendant wilfully made default, as that has been explained to you in these instructions, you are also to consider whether the defendant was summoned to appear and to produce certain records of the Civil Rights Congress, and whether the defendant did appear before the Un-American Activities Committee or subcommittee thereof. In other words, I have already charged you, as a matter of law, that certain

elements of the offense alleged in this indictment have been established, and therefore the only elements of the alleged offense which are now left for you are as follows:

1. Was the defendant summoned to appear before the [fol. 92] Un-American Activities Committee of the House or subcommittee thereof and to produce certain records of the Civil Rights Congress?

2. Did the defendant appear before the said committee or subcommittee thereof?

3. Did the defendant wilfully fail or wilfully refuse to produce the records designated in the subpoena before the said committee or subcommittee?

If you find from the evidence, and beyond a reasonable doubt, that the Government has affirmatively established all of such elements, then you must find the defendant guilty. And on the other hand, if the Government has failed to establish any one or more of such elements by evidence that convinces your minds beyond a reasonable doubt, then you must find the defendant not guilty.

When the defendant refused to answer questions of the Committee under the Fifth Amendment, you may not draw any inference against him on that account.

You are the sole judges of the facts, as I have already stated, and you are also the sole judges of the credibility of the witnesses and the weight to be given to the testimony, and of such exhibits as have been received as evidence in the case.

In determining the credit you will give a witness and the weight and value to be given to the testimony of a witness, you should take into consideration the demeanor of the witness upon the stand, his candor or lack of candor, the interest of the witness, if any, in the result or outcome of the case, the motives of the witness in testifying, the [fol. 93] knowledge and opportunity of the witness to know and be informed as to matters respecting which such witness gives testimony, and everything in connection with a witness which, in the light of human experience, will aid you in determining the proper weight and value to be given to his testimony. And of course, in this case there is just the

testimony of the one witness for you to weigh and evaluate, insofar as the testimony of the witness given here in court orally is concerned.

The failure of the defendant to take the witness stand and testify in his own behalf does not create any presumption against him. I charge you that you must not permit that fact to weigh in the slightest degree against the defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner. You are to decide this case solely on the evidence submitted here in court and the law given to you, and not upon any personal knowledge you may possess or which may be brought to your attention otherwise than during the course of the trial. You must look solely to the evidence introduced in determining the facts in this case, and you are not to consider any evidence which has been ruled inadmissible or stricken by the court, and you are not to speculate on reasons for the rulings of the court on objections to testimony or in striking or in excluding testimony.

You do have the right to draw reasonable inferences from facts established to your satisfaction, and you are expected to use your common sense and knowledge which you exercise in the every day affairs of life in considering the credibility of witnesses and the weight to be given to the evidence.

[fol. 94] In this case there are just two possible verdicts. You may find the defendant guilty as charged, or you may find the defendant not guilty.

When you retire to your jury room you will first of all choose one of your members as foreman. He or she will preside as chairman during your deliberations. When you reach a verdict your foreman will speak for you in returning the verdict in open court.

Swear an officer.

(Officer sworn to take charge of jury during its deliberations.)

The Court: You may retire now to the jury room.

(The jury then retired to the jury room.)

(The following proceedings were had out of the presence and hearing of the jury):

EXCEPTIONS TO CHARGE

The Court: Does the Government have any objections or exceptions to the charge of the court?

Mr. Woods: No exceptions.

The Court: Does the defendant have any objections or exceptions to the charge of the court?

Mr. Goodman: None other than I have already indicated on the record.

The Court: I take it that you had better be more specific, because the record should show it.

Mr. Goodman: I have, of course, taken exceptions to any of the rulings of the court in giving substantially the [fol. 95] Government's charge, requests to charge, and denying most of mine. I want to take an exception at this point.

The Court: You want to take exception to the requests that you have made,—

Mr. Goodman: That is right.

The Court: (Continuing) The failure to give them, that the court refused to give.

Mr. Goodman: That is right.

The Court: Are there any other objections or exceptions that you wish to take to the charge of the court?

Mr. Goodman: No, I do not think there are any others.

The Court: All right.

Mr. Goodman: The failure to give the instructions I have requested, and instead giving others in lieu of them. I do, of course, except to the instructions given by the court which are in effect substitutes for the instructions that I have asked for. I do not know just how to put it except in that way. I think that might be sufficient. For instance, the court ruled that, as a matter of law, the jury could not consider the question as to the failure of the Government to prove that the defendant Arthur McPhaul was connected with the Civil Rights Congress or had anything to do with it at all. The court also excluded from the jury's consideration the question as to whether he had possession of or con-

trol of the books. You have ruled that he must present these matters before the House Un-American Activities Committee, and can not present them here. Those are all in contra-distinction to the requests to charge that I made, [fol. 96] and therefore I have excepted to them.

The Court: I do find here that your No. 6 request was dealt with; that is, the question of whether the defendant was an officer or agent of the Civil Rights Congress. I know you argued that before the jury, and that was the reason I charged the jury with respect to that, that it would make no difference whether the defendant was designated in the subpoena as an officer or agent of the Civil Rights Congress, insofar as it would be his duty to produce the records. I might say that the reason I charged the jury on that point was because of the argument that you made to the jury on that very point; and also the only reason I charged the jury with respect to the existence of the records, and whether the defendant had possession or control of the records, was because of the argument that you made to the jury, even though I had informed you that I would refuse to give that request, a request to that effect.

Mr. Goodman: I understand you have charged the jury, and would under any circumstances, as I recollect our discussion on the requests to charge, that you did not consider that a matter for the jury to determine as a matter of fact.

The Court: Yes. I took the position, with respect to your requests to charge on the point with respect to the records, and whether the defendant had custody or possession of the records, and I informed you in chambers, and also in court here, that I felt that that was not a matter that could be presented on the trial of the case, inasmuch as it was not raised before the committee when the defendant appeared. And I might say that I do not believe I would [fol. 97] have charged the jury on that had you not nevertheless argued that to the jury.

Mr. Goodman: Well, I argued that as a part of my argument on the question of wilfulness.

The Court: Well, I think it still went to the very point that was requested; and I felt that inasmuch as that argu-

ment had been made, it was incumbent upon me to inform the jury what I considered the law to be.

Mr. Goodman: I understand what the court has stated right along; the court has stated its position right along.

The Court: All right.

Mr. Goodman: It is a case where the Judge and the lawyer disagree as to what the law is.

The Court: All right.

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VERDICT

(After due deliberation the jury returned the following verdict into open court):

The Court: You may take the verdict.

The Court Clerk: Members of the jury, have you agreed upon a verdict?

Jury Foreman: We have.

The Court Clerk: Do you find the defendant guilty or not guilty of the charges contained in the indictment?

Jury Foreman: Guilty.

The Court Clerk: Members of the jury, harken to your verdict as the court will record it. You say you find the defendant guilty of the charges contained in the indictment.

[fol. 98] The Jurors: (Collectively) We do.

The Court Clerk: So say you all.

The Jurors: (Collectively) We do.

• • • • • • •

The Court: . . . The sentence of the Court in your case is that you be committed to the custody of the Attorney General of the United States for a period of nine months, and that you pay a fine to the Government in the amount of five hundred dollars.

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[fol. 99]

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT—Entered March 8, 1957

On this 8th day of March, 1957 came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Contempt of Congress, in violation of Section 192, Title 2, USC, and Section 194, Title 2, USC, as charged in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of nine (9) months.

It Is Adjudged that the defendant shall pay to the Clerk of this Court, for the use and benefit of the United States, a committed fine in amount of Five Hundred ($500.00) Dollars.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Ralph M. Freeman, United States District Judge.

[fol. 100]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUEST TO CHARGE

1. Before you can find the defendant wilfully refused to produce the documents and records as charged in the indictment, you must first find beyond a reasonable doubt that such documents or records were in existence at the time of the service of the subpoena.

2. Before you can find that the defendant wilfully refused to produce the documents and records as charged in the indictment, you must first find beyond a reasonable doubt that such documents or records were in the custody or control of the defendant at the time of the service of the subpoena.

3. If upon all of the evidence you are unable to conclude beyond a reasonable doubt that the documents or records called for by the subpoena were in existence and in the custody or control of the defendant at the time of the service of the subpoena, then you cannot find that the defendant wilfully refused to produce such documents or records, and you must return a verdict of not guilty.

4. A wilful refusal within the meaning of the statute under which the defendant is charged in this case must be an intentional, final and irrevocable refusal.

5. In this case the Government claims that the defendant was an officer of the Civil Rights Congress and, as such, had custody or control of the records of that organization at the time the subpoena was served on him. If you find that the Government has failed to prove that defendant was an officer of the Civil Rights Congress or that, if he was an officer, he did not have custody or control of such records, then you will find the defendant not guilty.

[fol. 101] 6. The defendant was under no obligation, when he appeared and testified as a witness before the House Un-American Activities Committee, nor does he have any obligation in this case, to prove that he was not an officer or agent of the Civil Rights Congress, nor any obligation to prove that he was not in possession or control of the docu-

ments and records described in the subpoena, nor that such documents and records were in existence at the time the subpoena was served. The burden of proof to establish the existence of the documents and records and possession or control by the defendant is upon the government.

7. When the defendant refused to answer questions of the Committee, under the Fifth Amendment, you may not draw any inference against him on that account.

Goodman, Crockett, Eden & Robb, By: Ernest Goodman.

[fol. 102]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED—October 7, 1959

Before: Miller, Cecil and Weick, Circuit Judges.

This cause is argued by Ernest Goodman for appellant and by George E. Woods for appellee and is submitted to the court.

[fol. 102a]

IN THE UNITED STATES COURT OF APPEALS

JUDGMENT—Filed December 5, 1959

Appeal from the United States District Court for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 103] [File endorsement omitted]

No. 13,283

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR MCPHAUL, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

OPINION—December 5, 1959

Before: Miller, Cecil and Weick, Circuit Judges.

Weick, Circuit Judge. Appellant was served with a subpoena duces tecum requiring him to produce certain records of the Civil Rights Congress before the Committee on Un-American Activities of the United States House of Representatives on February 27, 1952, at Detroit, Michigan. The subpoena called for:

> "documents of the Civil Rights Congress relating to, (A) all records, correspondence, and memoranda pertaining to the organization of, and (B) the affiliation with other organizations, and (C) all moneys received or expended by the Civil Rights Congress."

Appellant appeared before the Subcommittee, accompanied by one of his counsel of record here, and distributed to the Subcommittee members copies of a prepared statement and a petition. He did not, however, produce the subpoenaed records.

Appellant was sworn as a witness and after giving his name and where he was born, admitted that he had been [fol. 104] served with the subpoena. After some sparring

with Subcommittee counsel during which he invoked the Fifth Amendment to the Constitution, he testified:

> "Q. Mr. Tavenner: (The Committee Counsel) No Sir. You have stated that you refuse to answer any questions pertaining to them [the records]. I have not asked you a question that pertains to them. I have asked you to produce the records. Now, will you produce them?
>
> A. Mr. McPhaul: I will not" (App. 45a).

Upon his refusal to produce the records, he was indicted for violation of Title 2 U. S. C., §192.[1] He was tried by a jury, convicted and sentenced to nine months imprisonment and fined $500. He appeals from the judgment of conviction.

In the District Court, appellant moved to dismiss the indictment and for a directed verdict of acquittal. Both of these motions were carefully considered by the District Judge, in oral opinions, in which he analyzed the issues and discussed the authorities. He denied the motions.

At the time of the trial in the District Court, the case of *Watkins* v. *United States*, 354 U. S. 178 (Decided June 17, 1957) had not been decided. The *Watkins* case was heavily relied upon by appellant in his brief filed in this Court on January 13, 1958 in support of his contentions

> (a) that the resolution creating the House Un-American Activities Committee was so vague as to constitute a denial of due process.

---

[1] "2 U. S. C., Sec. 192, provides:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

(b) that the resolution violated the First Amendment of the Constitution of the United States, and

(c) that the evidence was insufficient to prove that the subpoenaed records were pertinent to any lawful objective of the Committee's inquiry.

The latest pronouncement of the Supreme Court in *Barenblatt* v. *United States*, 360 U. S. 109 (Decided June 8, 1959) indicates that appellant's reliance on *Watkins* [fol. 105] was misplaced. See also: *Davis* v. *United States*, 269 F. 2d 357 (C. A. 6, 1959).

In considering whether the enabling resolution was unconstitutionally vague, the Court said:

"The Watkins case cannot properly be read as standing for such a proposition."

The Court further said:

"In this framework of the Committee's history we must conclude that its legislative authority to conduct the inquiry presently under consideration is unassailable, and that independently of whatever bearing the broad scope of Rule XI may have on the issue of 'pertinency' in a given investigation into Communist activities, as in *Watkins*, the Rule cannot be said to be constitutionally infirm on the score of vagueness."

The holding in *Barenblatt* controls the contention that the resolution violated the First Amendment to the Constitution, id. 134.

In regard to the issue of pertinency, appellant raised no objection on this ground before the Subcommittee. This factor distinguishes the instant case from *Watkins*.

Mr. Justice Harlan, in *Barenblatt*, pointed out this distinction. He said:

"In *Watkins* the petitioner had made specific objection to the Subcommittee's questions on the ground of pertinency; the question under inquiry had not been disclosed in any illuminating manner; and the questions asked the petitioner were not only amorphous on their face, but in some instances clearly

foreign to the alleged subject matter of the investigation—'Communism in labor.' Id., at 185, 209-215.

"In contrast, petitioner in the case before us raised no objections on the ground of pertinency at the time any of the questions were put to him." P. 123.

When the Subcommittee opened the hearings in Detroit, its Chairman made an announcement of the purpose and object thereof in which he said, among other things:

> "The purpose of this investigation is to determine first, whether there has been Communist activity in this vital defense area (Detroit), and if so, the nature, extent, character and objects thereof" (App. 32a).

The evidence disclosed that the Subcommittee had information to the effect that the Civil Rights Congress had [fol. 106] been declared a subversive organization by the Attorney General of the United States and that appellant was executive secretary thereof.

A previous witness before the Subcommittee, Richard F. O'Hair, had testified that appellant was a member of the Midtown Club of the Communist Party.

Appellant had been fully advised by the Chairman of the Subcommittee as to the nature and purpose of the investigation, namely, as to Communist activity in the Detroit area and the nature, extent, character and objects thereof. He was present with his counsel and had a prepared statement and a petition to file with the Subcommittee.

The Subcommittee, and not appellant, had the right to pass upon the pertinency of the subpoenaed records. Cf. *Barenblatt* v. *United States*, supra, p. 124. It could not do so because appellant had refused to produce them for its examination.

The pertinency claim is, therefore, without merit.

It is next contended that the trial judge erred in failing to direct a verdict of acquittal because the evidence failed to show that the subpoenaed records were in the possession or control of appellant.

The trouble with this contention is that, like the pertinency claim, it was never raised by appellant before the Subcommittee.

If he did not have possession or control of the records, proper respect for the authority of the Subcommittee would require him to so state. The Subcommittee would then have had the opportunity to investigate and prove otherwise if such were the truth. Appellant gave the Subcommittee no chance to consider the matter. In flagrant disregard of the Subcommittee's authority, appellant's answer to the question whether or not he would produce the subpoenaed records was "I will not."

Having taken the position before the Subcommittee that he would not produce the records, he cannot now claim that the Government was required to show that they were in his possession or control.

If appellant had any legitimate excuse for not complying with the subpoena, he should have made it known to the Subcommittee on the return day. Having failed to do so, he cannot urge it for the first time as a defense to the charge in the indictment. Cf. *United States* v. *Bryan*, 339 [fol. 107] U. S. 323; *United States* v. *Fleischman*, 339 U. S. 349; *Morrison* v. *California*, 291 U. S. 82.

Finally, it is contended that the subpoena was so broad and all inclusive as to constitute an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution.

The District Judge answered this contention quite effectively when he said:

> "There is nothing here to show the relationship of the defendant to these records or documents, and if they are the property of the Civil Rights Congress, that body and not the defendant has the right to exercise the privilege. And if we assume that the defendant is the owner of the records, or is an officer of the Civil Rights Congress, or one of the members of the Civil Rights Congress, so as to constitute him a so-called owner of the records, the request for the production of such records would not offend the Fourth Amendment if they contained matters that were within the

scope of the inquiry, and that could not be determined until the matter was properly presented to the Court."

In our judgment, this was a correct statement of the law.

The judgment of conviction is affirmed.

[fol. 108]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13,285

[Title omitted]

PETITION FOR REHEARING AND STAY OF MANDATE—
Filed December 23, 1959

Appellant, by his undersigned counsel, respectfully petitions this Honorable Court for a rehearing and stay of mandate in the above cause. The judgment of this Court was entered on December 5, 1959.

[fol. 109] The following arguments, presented in support of appellant's petition, do not include discussion of those points raised on the appeal which were specifically decided by this Court adversely to appellant. Rather, appellant addresses this petition to several issues with which the Court's opinion did not directly concern itself and the Court, upon reconsideration, may deem of sufficient legal and constitutional importance to warrant a rehearing.

1. The Court disposed of appellant's contention that the Government had failed to prove existence of the subpoenaed records and possession or control by appellant by holding that it was his duty to have asserted such matters before the subcommittee and "Having failed to do so he cannot urge it for the first time *as a defense* to the charge in the indictment." (Emphasis supplied.)

We believe that the Court misconceived the substance of appellant's argument. Existence of the subpoenaed records and possession or control by the appellant were not issues required to be raised by special defense. They were es-

sential elements of the crime charged, and the burden was on the Government to prove these as well as the other elements of the crime. (See *Nilva* v. *U. S.*, 352 U. S. 385; *U. S.* v. *Bryan*, 339 U. S. 323, quoted on pp. 21-24 appellant's brief.)

Perhaps, however, this Court's opinion tacitly assumed that the Government had proved "existence, possession or control" on the basis of an inference drawn from appellant's failure to raise these matters before the Subcommittee or from his statement that "I will not" produce the records. If this was the Court's rationale, it should consider the fol- [fol. 110] lowing:

a) Unless a presumption may reasonably be inferred from a proven fact, a conviction based thereon constitutes a denial of due process (*U. S.* vs. *Tot*, 319 U. S. 463; *U. S.* v. *Patterson*, 219 F. 2d 659). In this case, is it reasonable to infer that the records were in existence and that appellant had possession and control from the fact that appellant appeared before the Subcommittee and, when asked to produce the records, said "I will not"?

We believe not, because there are two other inferences, equally reasonable, but consistent with appellant's innocence, which may be drawn from this answer. The first, that appellant would not produce the records because he could not; the second, that appellant would not because of his claimed privilege under the Fifth Amendment.

b) Even assuming that appellant's refusal to produce formed some rational basis for raising an *inference* of "existence, possession or control," thereby creating some evidence for the jury on these issues, there was no statutory or logical basis for the trial court's creating a *conclusive* presumption of existence and possession by withdrawing those issues from the jury.

> "In strictness, there cannot be such a thing as a 'conclusive presumption.' Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is

shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and [fol. 111] not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence."

Wigmore on Evidence, 3rd Ed., par. 2492.

The appellant had a constitutional right to a *jury* determination of the "existence, possession or control" issues which the trial court here denied him. Thus, *U. S.* v. *Bryan*, 339 U. S. 323 is plainly *not* relevant here. There the defendant was held to have waived the right to contest a congressional committee's quorum; but the quorum question in *Bryan* was an issue of law for the judge and like many legal issues may be "waived" by the defendant by clear and unambiguous words and/or conduct.

But the concept that a defendant in a criminal case may "waive" fact-issues is not only anomalous but a dangerous doctrine; for it would permit the Court, by rulings on "waiver", to eliminate from jury determination elements deemed essential by the legislature in defining the crime.

2. The trial court's position, expressly affirmed by this Court, was that the appellant had a duty to tell the committee whether or not he possessed the records.

But if, as the trial court concluded, appellant in fact had the documents belonging to the Civil Rights Congress in his possession, it is clear that he might have invoked the Fifth Amendment against *questioning* by the committee about his possession, whatever his Fifth Amendment rights as to production of the documents.

Here again *U. S.* v. *Bryan* (supra) is plainly irrelevant, [fol. 112] for Bryan could not have been *incriminated* by objecting to the committee's quorum during the hearings.

Wherefore, appellant prays that a rehearing be granted. In the alternative, if the Court denies this petition, appellant requests that a stay of this Court's mandate be granted for a period of 30 days following the denial of this petition

to permit appellant to file a Petition for Certiorari in the U. S. Supreme Court.

Respectfully submitted,

Goodman, Crockett, Eden & Robb, By Ernest Goodman, Attorneys for Appellant-Petitioner, 3220 Cadillac Tower, Detroit 26, Michigan, WOodward 3-6268.

Dated: Detroit, Michigan, December 19, 1959.

CERTIFICATE OF COUNSEL

Ernest Goodman, attorney of record for appellant-petitioner herein, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for the purposes of delay.

Ernest Goodman, Attorney for Appellant-Petitioner.

Detroit, Michigan, December 19, 1959.

[fol. 113]

IN UNITED STATES COURT OF APPEALS

ORDER DENYING REHEARING—January 4, 1960

Upon consideration,

It Is Ordered that the petition for rehearing be denied and that a stay of this Court's mandate be granted for a period of thirty (30) days after the entry hereof, conditioned upon appellant filing a petition for certiorari in the Supreme Court within said period.

[fol. 114] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 115]

SUPREME COURT OF THE UNITED STATES

No. 617—October Term, 1959

ARTHUR M. McPHAUL, Petitioner,

—vs.—

UNITED STATES.

ORDER ALLOWING CERTIORARI—March 21, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 3 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. ~~674~~ 33

ARTHUR M. McPHAUL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GOODMAN, CROCKETT, EDEN & ROBB,
Attorneys for Petitioner,
3220 Cadillac Tower,
Detroit 26, Michigan.

Of Counsel:

RICHARD M. GOODMAN.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

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IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No.....

ARTHUR M. McPHAUL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit which affirmed a judgment of the United States District Court for the Eastern District of Michigan, Southern Division, convicting petitioner of criminal contempt and sentencing him to nine months in prison.

OPINION BELOW

The opinion of the Court of Appeals has not yet been officially reported but appears as an Appendix to this brief.

JURISDICTION

The judgment of the Court of Appeals was rendered on December 5, 1959 and re-hearing was denied on January 4, 1960. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. C., Sec. 1254.

STATUTES INVOLVED

2 U. S. C. Sec. 192,[1] provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000.00 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

[1] Sec. 194, which was also included in the indictment, sets forth the procedure for contempts arising under Sec. 192. Since no procedural issue is raised on this appeal, we do not set forth this section.

The authority of the Committee is contained in H. Res. 5, 79th Cong. 1st Sess., 91 Cong. Rec. 10, 15:

> "The Committee on Un-American Activities, as a whole or by sub-committee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

QUESTIONS PRESENTED

1. Where a defendant is tried for criminal contempt for failure to produce subpoenaed records before a Congressional Committee, may his conviction be sustained, consistent with due process and the right to a jury trial, where the Government failed to offer any evidence of the existence of the records or their possession by the defendant, and the trial court refused to submit to the jury the issue of existence or possession by the defendant of such records?

2. Was the subpoena constitutionally objectionable for the reason that it was so broad and all-inclusive as to constitute an unreasonable search and seizure?

3. Was the evidence sufficient to prove a) that the subpoenaed records were pertinent to the Committee inquiry and b) that the witness was fairly apprised of such pertinency?

STATEMENT OF THE CASE

The indictment against petitioner, returned on July 29, 1954 App. 3a),[2] charged that petitioner was served with a subpoena to produce and failed to produce certain records before the Committee on Un-American Activities of the United States House of Representatives at a hearing held at Detroit, Michigan on February 27, 1952, and thereby violated Sections 192 and 194 of Title 2 of the U. S. C. The records were described as:

> "Documents of the Civil Rights Congress relating to (A) all records, correspondence and memoranda pertaining to the organization of, and (B) the affiliation with other organizations, and (C) all monies received or expended by the Civil Rights Congress."

Petitioner's Motion to Dismiss the indictment was denied (App. 4a).

Trial commenced on December 18, 1956 and terminated on the following day. The Government called only one witness, Charles E. Potter, U. S. Senator from Michigan, who was at the time of the above mentioned hearings a member of the House of Representatives and of its Committee on Un-American Activities. In addition, the Government introduced a number of official documents relied upon to show the authority of the Committee, Congressional approval of the contempt citation and a portion of the transcript of the Detroit hearings of the Committee on February 27, 1952, including the opening statement of the Chairman (App. 30a-35a and 40a-62a).

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[2] App. refers to the Appendix to Appellant's brief in the Court below (and filed herewith), followed by the page number.

At the conclusion of the Government's case, petitioner moved for a directed verdict of not guilty on the following grounds:

a. For all of the reasons set forth in his earlier written motion to dismiss;

b. There was no evidence that the subpoenaed records were pertinent to the investigation;

c. There was no evidence that, at the time of the service of the subpoena the records were in existence;

d. There was no evidence that petitioner had custody or control of the records.

The motion was denied and petitioner offered no evidence.

Petitioner requested the Court to charge the jury concerning the duty of the Government to prove the existence of the subpoenaed records and that they were in petitioner's custody or control (App. 100a-101a). The Court declined to give such a charge and instead instructed the jury as follows (App. 90a):

> "If you find from the evidence in this case, and beyond a reasonable doubt, that the defendant appeared before the said Sub-Committee, and then refused or failed to make any explanation with respect to the existence of the records designated in the subpoena, or with respect to whether or not such records were under his possession or control, I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because if the defendant had legitimate reasons for failing

to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said Sub-Committee."

(App. 91a):

"The only elements of the alleged offense which are now left for you are as follows:

1. Was the defendant summoned to appear by the Un-American Activities Committee of the House or Sub-Committee thereof and to produce certain records of the Civil Rights Congress?

2. Did the defendant appear before said Committee or Sub-Committee thereof?

3. Did the defendant wilfully fail or wilfully refuse to produce the records designated in the subpoena before said Committee or Sub-Committee?"

And finally the Court told the jury that (91a):

"I also charge you that the defendant is not excused from compliance with or producing the records designated in the subpoena, merely because of any lack of proof of any connection between the defendant and the Civil Rights Congress."

At the conclusion of the trial a verdict of guilty was returned by the jury, and petitioner was sentenced to nine months' imprisonment and to pay a Five Hundred ($500.00) Dollars fine.

The material facts are not in dispute. In addition to those already referred to, the Government's proof consisted of the following:

The House Committee on Un-American Activities was constituted by the House of Representatives of the 82nd Congress (App. 48a-50a). A sub-committee of that Com-

mittee conducted a public hearing in the Federal Building in Detroit, Michigan on February 26th and 27th, 1952. The hearing was opened by a statement from the Chairman of the Committee concerning some of the general objectives of the Committee and its procedures, in the course of which he said, concerning the purpose of the Detroit hearings:

> "The purpose of this investigation is to determine first, whether there has been Communist activity in this vital defense area (Detroit), and if so, the nature, extent, character and objects thereof" (App. 32a).

Pursuant to a subpoena served on petitioner, in the form set forth in the indictment, he appeared with counsel before the sub-Committee on February 27th. After being sworn and stating his name, place and date of birth and that he had been served with the subpoena, he declined to answer all questions relating to the records described in the subpoena, claiming his privilege under the Fifth Amendment (App. 40a-45a), except that the final question and answer were as follows:

> "Q. Mr. Tavenner: (The Committee Counsel.) No sir. You have stated that you refuse to answer any questions pertaining to them. I have not asked you a question that pertains to them. I have asked you to produce the records. Now, will you produce them?
>
> A. Mr. McPhaul: I will not" (App. 45a).

REASONS FOR GRANTING THE WRIT

I.

WHERE A DEFENDANT IS TRIED FOR CONTEMPT FOR FAILURE TO PRODUCE RECORDS BEFORE A CONGRESSIONAL COMMITTEE, MAY HIS CONVICTION BE SUSTAINED, CONSISTENT WITH DUE PROCESS AND THE RIGHT TO A JURY TRIAL, WHERE THE GOVERNMENT FAILED TO PRODUCE ANY EVIDENCE OF THE EXISTENCE OF THE RECORDS OR POSSESSION BY THE DEFENDANT, AND THE TRIAL COURT REFUSED TO SUBMIT THE ISSUE OF EXISTENCE AND POSSESSION TO THE JURY?

1. It is apparent from the record—indeed it is implicitly conceded by the Government and by both Courts below—that no evidence was offered at petitioner's trial to establish existence of the subpoenaed records or petitioner's possession or control of such records. Since wilfulness is an essential element of the offense, specifically set forth in the statute and charged in the indictment, it is difficult to understand how one can be convicted of *wilfully* refusing to produce something that is not shown to be in existence and within his power to produce.

In *U. S. v. Patterson*, 219 F. 2d 659 (C. A. 2nd), the issue which arises here was unequivocally presented. Defendant previously had been convicted of criminal contempt for refusal to turn over the records of the Civil Rights Congress. Unlike here, the evidence at Patterson's trial showed him to be Executive Secretary and in charge of the records of the organization.[3] He served a 90-day sentence from July 1st to September 28, 1954. In October, 1954, follow-

[3] In the instant case there is no evidence of any connection between petitioner and the organization whose records were demanded in the subpoena, the Civil Rights Congress. Exhibit No. 9, which was offered by the Government as letterhead of the organization purporting to contain petitioner's name, was not received in evidence (App. 69a).

ing his release, defendant was again called before the Grand Jury where he again refused to answer any questions concerning the records, claiming the privilege of the Fifth Amendment. His second contempt conviction followed. On appeal, the Court, after finding that there was sufficient evidence that the records were in existence and under defendant's control in June, 1954, concluded that defendant's second conviction should be reversed because the Government had failed to prove existence of the records and control by the defendant in October, 1954 when the defendant again testified before the Grand Jury. The Court said:

> "The decision below rested primarily on a presumption of continued possession and existence held sufficient to constitute a *prima facie* case for the government. Neither the existing precedents nor the facts of the case warrant such a drastic shifting of the burden of proof in a criminal case."

This holding in *Patterson* was cited with approval by this Court in the more recent case of *Nilva v. U. S.*, 352 U. S. 385, 77 S. Ct. 431. *Nilva* involved a conviction for criminal contempt for failure to produce the records of a corporation of which defendant was an officer, pursuant to a subpoena issued to the corporation. The defendant appeared before the Court pursuant to the subpoena; he admitted that he was an officer of the corporation, and brought with him part of the records called for in the subpoena but stated his inability to locate the remaining records. Whereupon the Court ordered all the company records impounded and among these were found the records called for in the subpoena and not produced by the defendant. In its decision affirming the conviction in part, the Supreme Court held that there was sufficient evidence to support the charge that defendant had wilfully failed to produce certain of the records called for in the subpoena. The Court framed the issue involved as follows:

"This reduces the case to the charge that petitioner wilfully disobeyed the court's order to produce certain corporate records required by subpoena No. 160. On that issue, it is settled that a criminal contempt is committed by one who, in response to a subpoena calling for corporation or association records, refuses to surrender them *when they are in existence and were within his control. United States v. Fleischman*, 339 U. S. 349, 70 S. Ct. 739, 94 L. Ed. 906; *U. S. v. White*, 322 U. S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542; *Wilson v. U. S.*, 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771; and see *U. S. v. Patterson*, 2 Cir., 219 F. 2d 659." (at p. 392.) (Our emphasis.)

In its finding on the issue thus framed, the Court held:

"In our opinion, the evidence reasonably supports the conclusion *that those records were in existence and were within petitioner's control.*" (Emphasis supplied.)

Thus, this Court's most recent decision in this area of law; recognized the rule that in criminal contempt, based upon refusal to produce records, the Government must prove that the subpoenaed records were in existence and that they were within the defendant's control.

2. In the present case no presumption of continued possession, as unsuccessfully asserted in *Patterson*, is possible since there is *no* evidence that the subpoenaed records were ever in existence or that petitioner was in possession or control.[4] Indeed the Trial Court did not base his opin-

---

[4] The Court over objection, permitted the witness, Senator Potter, to testify *on the issue of "pertinency" only*, and outside the presence of the jury, to the following:

"A. The Committee had information that Mr. McPhaul was executive secretary of the Civil Rights Congress. Based upon that knowledge of the Committee Mr. McPhaul was subpoenaed to produce the documents" (App. 26a).

The Government introduced no other evidence on this issue.

ion upon any presumption of possession, but rather, on an entirely different legal premise. In his charge to the jury, the Court stated his position as follows:

> "* * * I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because *if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said sub-committee.*" (App. 90a.) (Our emphasis.)

The Court of Appeals accepted this view.

Apparently, it was the view of both Courts below that unless a person who is subpoenaed to bring records of an organization asserts before the Committee the non-existence or his lack of possession of the records as his reason for not bringing the records, the Government is relieved of its burden, at a subsequent contempt trial of proving their existence and his possession or control. Thus, the Courts here went even further than the Government's position in *Patterson*, where it only contended for a shifting of the burden of proof.

The Trial Court relied on *United States v. Bryan*, 339 U. S. 323 and *United States v. Fleischman*, 339 U. S. 349, to support his conclusion (See App. 78a-83a). We believe the Court misunderstood the import of these decisions and that actually both of these cases support petitioner's position. Both the *Bryan* and *Fleischman* cases involved attempts by the House un-American Activities Committee to obtain the records of the Joint Anti-Fascist Refugee Committee. In the *Bryan* case the Committee's subpoena was addressed to the Executive Secretary. In *Fleischman* it

subpoenaed the members of the executive board. *Miss Bryan admitted her official capacity and that the records were in her possession* but denied the authority of the Committee to obtain them. In *Fleischman*, the board members admitted their official capacity but took the position that each had no authority to act apart from action by the board as a whole, and that, since the board had not taken action, each member was unable to comply with the subpoena.

It will be observed that in both of these cases the official capacity of the defendant and the existence, and some element of control of the records was admitted or shown by the proofs. (*Fleischman*, at Note 3, p. 352.) Indeed, the dissents in those cases are bottomed principally upon a disagreement as to the sufficiency of the evidence of control (70 S. Ct. at p. 738, 748, 753) : not the *necessity* for such evidence. Thus, neither in *Bryan* or *Fleischman*, was the Court called upon to decide, nor did it decide that the Government was exonerated from proof of evidence or control by reason of the witnesses' position before the committee. Indeed, language in the Court's opinion in *Bryan* pre-supposes that the burden of proof on these issues is always on the Government:

> "But when the Government introduced evidence in this case that respondent had been validly served with a lawful subpoena directing her to produce records within her custody and control and that on the day set out in the subpoena she intentionally failed to comply, it made out a *prima facie* case of wilful default." (At p. 330.) (Our emphasis.)

What this Court actually held in *Bryan* and *Fleischman* was that the defense of lack of a committee quorum could not be raised for the first time at the contempt trial. This, however, hardly means that *every* defense which a witness

asserts at his contempt trial must first be raised and determined by the Committee. Two reasons will serve to point up why this cannot be a hard and fast rule.

First, there obviously is no purpose in a witness being required to raise before a Committee an issue which the Committee is powerless to determine. The issue which petitioner here raised at his trial was the failure of the Government to present evidence essential to establish its charge of a "wilful" default; that evidence being existence of the records and control by petitioner. The Committee, unlike a Court dealing with a witness brought before it by subpoena, clearly lacked the authority to determine this issue.

Additionally, we deal with a situation where Congress did not elect to call the petitioner before its bar to resolve the issues raised by his refusal and to impose punishment itself (cf. *Jurney v. MacCracken*, 294 U. S. 125, 55 S. Ct. 375); but instead, invoked the power of the Court under a statute which requires that the defualt be found to have been "wilful."

The distinction between these situations is vital. The Court that issues a subpoena has power to make a *legal* determination of its validity and to impose punishment for a violation of the command of its subpoena. The Congress, electing to enforce its own subpoena, possesses a similar power and makes a similar determination. In either instance the tribunal which is to impose the penalty for the alleged violation, is the only one competent to hear and to make a *legal* determination of the validity of a defense based upon an absence of wilfulness.

But a Committee has no such power. True, it may inquire into the existence and possession of the records. But this is done not for the purpose of determining the issue

of "wilfulness" under the contempt statute; but, rather, for the purpose of eventually obtaining the records if they can be located.

Again, the situation which gave rise to the above holding in *Bryan* and *Fleischman* is altogether different from that presented here. A Committee certainly has power to determine whether or not it has a quorum; and the lack of a quorum, if called to the Committee's attention, can be remedied by the Committee. Fairness to the Committee, therefore, demands that it be apprised at the hearing that a witness intends to challenge the legal composition of the Committee. Otherwise, such a "procedural" point may reasonably and properly be said to have been waived. But it hardly comports with the requirements of due process and a right to jury trial to hold, as the Courts below have in effect done, that a witness waives his constitutional right to a jury determination on the element of the wilfulness of his default, because he fails to explain to the Committee at the hearing why he is unable to produce the subpoenaed records. Constitutional rights are not so easily presumed waived.

The second reason why *Bryan* and *Fleischman* are not controlling on the question here, is that in neither of those cases did the witness claim his Fifth Amendment privilege with respect to questions concerning the existence and possession of the documents. Indeed, in both of those cases the objection or defense based upon absence of a quorum could have been raised before the Committee without any fear that the witness' statement would tend to incriminate him. He need only have said, "Mr. Chairman, I suggest the absence of a quorum."

Not so, however, with respect to a defense based upon lack of existence or control of the documents. As we show

later, the assertion of this defense before the Committee would require that the witness testify. Petitioner here claimed his privilege with respect to "any question which deals with the possession or custody of the books and records called for in the subpoena." (App. 40a and 45a). Clearly, in the setting created by the Chairman's opening statement (App. 31a-35a) and the prior testimony before the Committee (App. 24(a), 25(a) and 27(a)), petitioner was justified in invoking his privilege, and the Committee impliedly so ruled (App. 40a). See *Emspak v. United States*, 349 U. S. 190 and *Quinn v. United States*, 349 U. S. 155.

3. If the view of the law taken by the Courts below in this case were upheld, it would effectively curtail the protection of the Fifth Amendment against self-incrimination; a protection which the Courts have uniformly upheld in recent years against infringement by Congressional Committees. For, with respect to the organizational records of claimed "subversive" organizations, the Committee need only substitute a subpoena duces tecum for the ordinary subpoena and cause the same to be served upon an alleged member. The alleged member-witness could hardly explain the existence or non-existence, his control or non-control of the organization's records, without also being required to explain his relationship to the organization and testify as to his knowledge of its records—information which he could not be compelled to give pursuant to an ordinary subpoena to testify. *Blau v. United States*, 340 U. S. 159, 71 S. Ct. 223.

Under the ruling of the Trial Court such a member-witness, even if he were unable to produce the records, would have to risk either self-incrimination in his answers or be held in contempt for failure to produce the records since the Government would no longer have to prove existence

or control and he would be precluded from making an affirmative defense on that ground. Just such a contention was met in *Traub v. U. S.*, 232 F. 2d 43, where the Trial Court's position was stated as follows:

> "A witness who fails to produce all the papers listed in a subpoena is guilty of contempt unless he demonstrates that he is acting in good faith. This demonstration of good faith requires that he answer questions relating to the existence and location of papers he has not produced even though the answers will incriminate him."

The Court of Appeals answered this contention—identical to that of the Trial Court here—as follows:

> "In other words the witness can then choose his own brand of hemlock. He can destroy himself either by failing to produce records called for by a subpoena (even if they are not in his possession or control when the subpoena was served); by refusing to answer questions (even if he has claimed the protection of the privilege—); or by giving incriminating answers. This view is plainly untenable."

We have been unable to find a single Court decision in which a conviction for contempt for refusal to produce records pursuant to a subpoena was upheld where there was no evidence that the records were in existence and that the witness was in a position to produce them. In every such case which has come to our attention there was some evidence of existence of the records and ability to produce them, or some evidence showing that the witness held an official position with the organization whose records were subpoenaed. We are constrained to believe that the reason for the absence of any decision supporting the rule of law applied by the Courts below in this case, is the im-

plicit assumption by all Courts that Constitutional due process demands that conviction for "wilful" refusal to produce records requires proof of the existence of the records and of a witness' ability to produce them.

4. The error made by the Court below in sustaining petitioner's conviction, notwithstanding the record failed to show existence of the subpoenaed documents or his control of them, is compounded by the Trial Court's denial of a jury trial to the petitioner on an essential element of the offense. If, as we have demonstrated above, proof of "wilfulness" required that the Government carry the burden of showing such existence and control (*United States v. Patterson, supra*) it follows that it was the province of the jury, and not the Trial Judge, to determine if that burden was met. Here, however, the Trial Judge, while submitting to the jury the question of "wilfulness", instructed them (App. 90a):

> "If you find from the evidence in this case, and beyond a reasonable doubt, that the defendant appeared before the said subcommittee, and then refused or failed to make any explanation with respect to the existence of the records designated in the subpoena, or with respect to whether or not such records were under his possession or control, *I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant*, because if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said subcommittee." (Our emphasis.)

What the Trial Court actually did was to create a *conclusive presumption* by thus predicating a finding of exist-

ence and possession upon proof that the petitioner had failed to make an explanation before the committee.

This Court has held that unless a presumption may reasonably be inferred from a proven fact, a conviction based thereon constitutes a denial of due process (*U. S. v. Tot*, 319 U. S. 463). In this case, the only proven fact was petitioner's refusal to produce the records. Is it reasonable to infer from this that the records were in existence and that petitioner had possession and control?[5]

We believe not, because there are two other inferences, equally reasonable, but consistent with petitioner's innocence, which may be drawn from this answer. The first, that petitioner would not produce the records because he could not; the second, that petitioner would not because of his claimed privilege under the Fifth Amendment.

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[5] At one point in his opinion denying petitioner's motion for a directed verdict, the Court referred to petitioner's testimony before the Committee where, in response to the question "Now, will you produce them?", petitioner answered "I will not," and said:

> "This Court feels that that is an absolute refusal to produce the records. At least, it is testimony from which this Court feels an inference may be drawn that this defendant did have the records under his custody or in his possession, and nevertheless refused to produce them" (App. 83a).

The Court, however, eventually concluded that, whether petitioner had possession of the records or not, was not an issue which could be litigated in the absence of an explanation by him to the Committee, and the Court withdrew the matter from consideration by the jury. (See *supra* p. 17.) It is petitioner's position that, even if the Court had taken the view that the issue of existence and custody of the records could be litigated, the foregoing testimony was insufficient to submit the issue to the jury since the answer was at least as consistent with innocence as guilt.

See: *Hanson v. U. S.*, 208 F. 2d 914;
People v. Fleish, 321 Mich. 443.

However, even assuming that petitioner's refusal to produce formed some rational basis for raising an *inference* of "existence, possession or control", thereby creating some evidence for the jury on these issues, there was no statutory or logical basis for the Trial Court's creating a *conclusive* presumption of existence and possession by withdrawing those issues from the jury:

> "In strictness, there cannot be such a thing as a 'conclusive presumption'. Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence."

Wigmore on Evidence, 3rd Ed., par. 2492.

II.

WAS THE SUBPOENA CONSTITUTIONALLY OBJECTIONABLE FOR THE REASON THAT IT WAS SO BROAD AND ALL-INCLUSIVE AS TO CONSTITUTE AN UNREASONABLE SEARCH AND SEIZURE?

The Fourth Amendment applies to compulsory subpoenas. *Hale v. Henkel*, 201 U. S. 43; *Fed. Trade Com. v. American Tobacco Company*, 264 U. S. 298; *Brown v. U. S.*, 276 U. S. 134. In its recent decision, in *Watkins v. U. S.*, 354 U. S. 178, this Court recognized that witnesses called before a Congressional Committee were entitled to the protection of the Fourth Amendment. In enumerating

the constitutional rights which such a Committee was required to accord to a witness, the Court said:

> "They cannot be subjected to unreasonable search and seizure" (at p. 188).

In this case, the subpoena called upon the petitioner to produce the following documents:

> "All records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the Civil Rights Congress."

It will be observed that the subpoena is limitless as to time and that the documents it seeks are not limited to any claimed scope of inquiry which the Committee might conceivably possess. Assuming, however, that the Committee had a legitimate scope of inquiry concerning communism, the subpoena did not attempt to limit the records subpoenaed even to that extent. The subpoena would compel the production of an unspecified amount of organizational records, unlimited as to time and as to the nature or character of the records sought. In this respect it is similar to the one issued in *Federal Trade Commission v. American Tobacco Co., supra*, which was held to be invalid under the Fourth Amendment. As to such a subpoena, Justice Holmes said:

> "Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. • • •
>
> "It is contrary to the first principles of justice to allow a search through all the respondent's records,

relevant or irrelevant, in the hope that something will turn up."

Even if, among the mass of records covered by the subpoena, there might be some which would be pertinent to a proper objective of the Committee's inquiry, yet the scope of the subpoena is so broad as to constitute an unconstitutional search and seizure. In *Annenberg v. Roberts*, 2 A (2d) 612, (Pa.), the Court, in holding similarly broad subpoenas to be unconstitutional, said:

> "The subpoenas show on their face that they contemplate an unreasonable search and seizure. They violate the principle which we announced in the American Car Foundry case, 70 Atl. 867, * * * where we held that *a subpoena duces tecum could not properly be issued to have brought in a mass of books and papers in order that there might be a search through them together evidence.* We therefore are of the opinion that the subpoenas as issued commanding plaintiffs to produce before the Commission the things therein set forth are void in that they do not show that the demands therein are germane to the inquiry authorized by the Governor's call. * * *"[6] (Our emphasis.)

Nor is there any evidence in this record which would justify the compulsory production of this vast array of records. The record is silent as to the content of the records, correspondence and memoranda sought or the purpose for which the monies received and expended were related to the proper objectives of the Committee's inquiry. As the Court said in *Hale v. Henkel, supra:*

---

[6] For other cases holding similar broad subpoenas to be void as constituting an unreasonable search and seizure, see *Hale v. Henkel, supra; People v. Reynolds*, 350 Ill. 11, 182 N. E. 754.

> "Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers."

In this case no such necessity was shown before the Committee, nor, indeed, was any shown at the trial.

III.

WAS THE EVIDENCE SUFFICIENT TO PROVE a) THAT THE SUBPOENAED RECORDS WERE PERTINENT TO THE COMMITTE INQUIRY AND, b) THAT THE WITNESS WAS FAIRLY APPRISED OF SUCH PERTINENCY?

Although this issue was considered by the Trial Court within the framework of the term "pertinency", a more precise formulation was stated by this Court in *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186 where the power to issue and the right to resist a subpoena duces tecum issued by an agency of government (including Congressional Investigating Committees) was considered. There the Court defined the right entitled to protection, as follows:

> "The gist of the protection is in the requirement, expressed in terms, that *the disclosure sought shall not be unreasonable*" (at p. 208).
>
> "Beyond this the requirement of reasonableness, including particularity in 'describing the place to be searched, and the persons or things to be seized,' also literally applicable to warrants, comes down to *specification of the documents to be produced adequate*, but not excessive, *for the purposes of the relevant inquiry*" (at p. 209). (Our emphasis.)

In the light of these considerations, the Court then went on to consider whether the subpoena on its face and the other evidence was sufficient.[7]

The Court upheld the validity of the subpoena because of the "allegations concerning coverage" and the showing that the Administrator "was proceeding with his investigation in accordance with the mandate of Congress and that the records sought were relevant to that purpose" (at p. 216).

The testimony presented by the Government in this case on the issue of pertinency was taken on a separate record, outside the presence of the jury (at pp. 19a-38a) and can be readily summarized.

The witness, Senator Potter, himself summarized the Government's basic position in the following testimony:

> "As I testified before, the Civil Rights Congress had been declared a subversive organization by the Attorney-General. The committee found, along with the Attorney-General, that the Civil Rights Congress was a Communist front organization.[8] The enunciated purpose of our hearings here in Detroit was to determine the extent of Communist activity in the area. Therefore, the Committee subpoenaed the records of the Civil Rights Congress as pertinent to our investigation" (27a).

---

[7] The subpoena, issued by the Administrator of the Fair Labor Standards Act, sought production of the employer's records relating to coverage and to wages paid and hours worked during a specified period (See footnote 46 at p. 210 for full language of subpoena).

[8] The Court, on petitioner's prior objection, ruled that he would have to strike the answer with respect to the Civil Rights Congress' being a subversive organization unless better evidence was offered (21a). No better evidence was offered.

The remaining relevant testimony on this issue showed that a witness before the committe had identified an Arthur McPhaul as a member of the Communist Party (App. 24a), although the Government was unable to identify the petitioner as the person named by the witness (App. 36a); that the petitioner had appeared before the Committee in response to the subpoena and had claimed the Fifth Amendment privilege with respect to all questions relating to the possession or custody of the records called for in the subpoena (41a-45a).

Applying the yardstick used in *Oklahoma Press* to the foregoing facts to determine the reasonableness of the demand of the subpoena issued to petitioner, and that the specification of the records sought appeared to be relevant to the purpose of the inquiry, we submit that the evidence is insufficient for these reasons:

In this case the object of the inquiry was to determine "whether there has been Communist activity in this vital defense area (Detroit), and if so, the nature, extent, character and objects thereof" (App. 32a).

The only possible link between the objectives of the investigation—communism in the Detroit area—and the records sought was questionable evidence that the Civil Rights Congress had been "declared a subversive organization by the Attorney-General". But this nexus is to the organization, *not* to the records. Without such a nexus there is no evidence, here, as to the character of the records sought or any indication as to the relationship between these *records* and the objectives of the Committee's inquiry.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

GOODMAN, CROCKETT, EDEN & ROBB,

By ERNEST GOODMAN,
Attorneys for Petitioner,
3220 Cadillac Tower,
Detroit 26, Michigan.

Of Counsel:

GEO. W. CROCKETT, JR.
RICHARD M. GOODMAN.

Dated: Detroit, Michigan,
January 27, 1960.

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 13,285

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR McPHAUL,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

Decided December 5, 1959.

Before: MILLER, CECIL and WEICK, Circuit Judges.

WEICK, Circuit Judge. Appellant was served with a subpoena duces tecum requiring him to produce certain records of the Civil Rights Congress before the Committee on Un-American Activities of the United States House of Representatives on February 27, 1952, at Detroit, Michigan.

The subpoena called for:

> "documents of the Civil Rights Congress relating to (A) all records, correspondence, and memoranda pertaining to the organization of, and (B) the affiliation with other organizations, and (C) all moneys received or expended by the Civil Rights Congress."

Appellant appeared before the Subcommittee, accompanied by one of his counsel of record here, and distributed to the Subcommittee members copies of a prepared statement and a petition. He did not, however, produce the subpoenaed records.

Appellant was sworn as a witness and after giving his name and where he was born, admitted that he had been served with the subpoena. After some sparring with Subcommittee counsel during which he invoked the Fifth Amendment to the Constitution, he testified:

> "Q. Mr. Tavenner: (The Committee Counsel) No Sir. You have stated that you refuse to answer any questions pertaining to them [the records]. I have not asked you a question that pertains to them. I have asked you to produce the records. Now, will you produce them?
>
> A. Mr. McPhaul: I will not" (App. 45a).

Upon his refusal to produce the records, he was indicted for violation of Title 2 U. S. C., §192.[1] He was tried by a jury, convicted and sentenced to nine months imprisonment and fined $500. He appeals from the judgment of conviction.

In the District Court, appellant moved to dismiss the indictment and for a directed verdict of acquittal. Both of these motions were carefully considered by the District Judge, in oral opinions, in which he analyzed the issues and discussed the authorities. He denied the motions.

---

[1] "2 U. S. C., Sec. 192", provides:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

At the time of the trial in the District Court, the case of *Watkins v. United States*, 354 U. S. 179 (Decided June 17, 1957) had not been decided. The *Watkins* case was heavily relied upon by appellant in his brief filed in this Court on January 13, 1958 in support of his contentions

(a) that the resolution creating the House Un-American Activities Committee was so vague as to constitute a denial of due process.

(b) that the resolution violated the First Amendments of the Constitution of the United States, and

(c) that the evidence was insufficient to prove that the subpoenaed records were pertinent to any lawful objective of the Committee's inquiry.

The latest pronouncement of the Supreme Court in *Barenblatt v. United States*, 360 U. S. 109 (Decided June 8, 1959) indicates that appellant's reliance on *Watkins* was misplaced. See also: *Davis v. United States*, 269 F. 2d 357 (C. A. 6, 1959).

In considering whether the enabling resolution was unconstitutionally vague, the Court said:

"The Watkins case cannot properly be read as standing for such a proposition."

The Court further said:

"In this framework of the Committee's history we must conclude that its legislative authority to conduct the inquiry presently under consideration is unassailable, and that independently of whatever bearing the broad scope of Rule XI may have on the issue of 'pertinency' in a given investigation into Communist activities, as in *Watkins*, the Rule cannot be said to be constitutionally infirm on the score of vagueness."

The holding in *Barenblatt* controls the contention that the resolution violated the First Amendment to the Constitution, id. 134.

In regard to the issue of pertinency, appellant raised no objection on this ground before the Subcommittee. This factor distinguishes the instant case from *Watkins*.

Mr. Justice Harlan, in *Barenblatt*, pointed out this distion. He said:

> "In *Watkins* the petitioner had made specific objection to the Subcommittee's questions on the ground of pertinency; the question under inquiry had not been disclosed in any illuminating manner; and the questions asked the petitioner were not amorphous on their face, but in some instances clearly foreign to the alleged subject matter of the investigation—'Communism in labor.' Id., at 185, 209-215.
>
> "'In contrast, petitioner in the case before us raised no objections on the ground of pertinency at the time any of the questions were put to him." P. 123.

When the Subcommittee opened the hearings in Detroit, its Chairman made an announcement of the purpose and object thereof in which he said, among other things:

> "The purpose of this investigation is to determine first, whether there has been Communist activity in this vital defense area (Detroit), and if so, the nature, extent, character and objects thereof" (App. 32a).

The evidence disclosed that the Subcommittee had information to the effect that the Civil Rights Congress had been declared a subversive organization by the Attorney General of the United States and that appellant was executive secretary thereof.

A previous witness before the Subcommittee, Richard F. O'Hair, had testified that appellant was a member of the Midtown Club of the Communist Party.

Appellant had been fully advised by the Chairman of the Subcommittee as to the nature and purpose of the investigation, namely, as to Communist activity in the Detroit area and the nature, extent, character and objects thereof.

He was present with his counsel and had a prepared statement and a petition to file with the Subcommittee.

The Subcommittee, and not appellant, had the right to pass upon the pertinency of the subpoenaed records. Cf. *Barenblatt v. United States, supra*, p. 124. It could not do so because appellant had refused to produce them for its examination.

The pertinency claim is, therefore, without merit.

It is next contended that the trial judge erred in failing to direct a verdict of acquittal because the evidence failed to show that the subpoenaed records were in the possession or control of appellant.

The trouble with this contention is that, like the pertinency claim, it was never raised by appellant before the Subcommittee.

If he did not have possession or control of the records, proper respect for the authority of the Subcommittee would require him to so state. The Subcommittee would then have had the opportunity to investigate and prove otherwise if such were the truth. Appellant gave the Subcommittee no chance to consider the matter. In flagrant disregard of the Subcommittee's authority, appellant's answer to the question whether or not he would produce the subpoenaed records was "I will not."

Having taken the position before the Subcommittee that he would not produce the records, he cannot now claim that the Government was required to show that they were in his possession or control.

If appellant had any legitimate excuse for not complying with the subpoena, he should have made it known to the Subcommittee on the return day. Having failed to do so, he cannot urge it for the first time as a defense to the charge in the indictment. Cf. *United States v. Bryan*, 339 U. S. 323; *United States v. Fleischman*, 339 U. S. 349; *Morrison v. California*, 291 U. S. 82.

Finally, it is contended that the subpoena was so broad and all inclusive as to constitute an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution.

The District Judge answered this contention quite effectively when he said:

> "There is nothing here to show the relationship of the defendant to these records or documents, and if they are the property of the Civil Rights Congress, that body and not the defendant has the right to exercise the privilege. And if we assume that the defendant is the owner of the records, or is an officer of the Civil Rights Congress, or one of the members of the Civil Rights Congress, so as to constitute him a so-called owner of the records, the request for the production of such records would not offend the Fourth Amendment if they contained matters that were within the scope of the inquiry, and that could not be determined until the matter was properly presented to the Court."

In our judgment, this was a correct statement of the law.

The judgment of conviction is affirmed.

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No. ~~674~~ 33

In the Supreme Court of the United States

OCTOBER TERM, 1959

ARTHUR M. McPHAUL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
J. WALTER YEAGLEY,
Assistant Attorney General,
KEVIN T. MARONEY,
GEORGE B. SEARLS,
Attorneys,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 674

ARTHUR M. McPHAUL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) is reported at 272 F. 2d 627.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1959, and rehearing was denied on January 4, 1960. The petition for a writ of certiorari was filed on February 3, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant who, after having been subpoenaed to produce records by a Congressional committee, flatly and without explanation refuses to produce them, may raise certain defenses for the first time at his trial for criminal contempt.

STATUTE INVOLVED

2 U.S.C. 192 is set forth on page 2 of the petition.

STATEMENT

Petitioner was charged in a one-count indictment in the United States District Court for the Eastern District of Michigan with contempt of Congress in violation of 2 U.S.C. 192 (App. 3a).[1] The indictment alleged that petitioner had wilfully failed and refused to produce records of the Civil Rights Congress which he had been subpoenaed to produce before the House Committee on Un-American Activities or a duly authorized subcommittee thereof. After his motion to dismiss the indictment was denied (App. 4a), he was tried before a jury on December 18 and 19, 1956.

The evidence at the trial was as follows: The House Committee on Un-American Activities was constituted by the House of Representatives of the 82d Congress (App. 48a–50a). A duly authorized subcommittee of that Committee conducted a public hearing in Detroit, Michigan, on February 25 through 29, 1952. Petitioner was subpoenaed to appear to testify on February 26, 1952, and to produce "all records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the Civil Rights Congress" (App. 6a). Petitioner was subpoenaed because the Committee had information that he was executive director or executive secretary of the Civil Rights Congress, which had been declared a subver-

[1] "App." refers to the Appendix to petitioner's brief in the court below, which has been filed in this Court.

sive organization by the Attorney General and which was believed to be such an organization by the Committee (App. 20a–21a, 26a–27a).

At the outset of the subcommittee hearing, Congressman Wood, who was chairman of the subcommittee and of the Committee itself (App. 8a, 50a), stated that (App. 32a):

> Investigation in the city of Baltimore, the State of Massachusetts, and other places has disclosed a concentration of Communist effort in certain defense areas of the country. * * * There is no area of greater importance to the Nation as a whole, both in time of peace and in time of war, than the general area of Detroit which won the title, "The Arsenal of Democracy." *The purpose of this investigation is to determine first, whether there has been Communist activity in this vital defense area, and if so, the nature, extent, character and objects thereof.* [Emphasis added.]

Petitioner, who was represented by counsel (App. 42a), appeare before the subcommittee on February 27. The following colloquy then occurred (App. 40a).

> Mr. WOOD. Mr. McPhaul, the committee has heretofore served upon you a subpoena duces tecum, to produce certain records and documents. Are you prepared to respond to that subpoena?
>
> * * * * *
>
> Mr. MCPHAUL. Mr. Wood, I refuse to answer this or any question which deals with the possession or custody of the books and records called for in the subpoena. I claim my priv-

ilege under the fifth amendment of the Constitution.

The petitioner was then sworn (App. 42a). After he had handed the subcommittee copies of a prepared statement and a petition (App. 42a–43a), he was asked (App. 45a):

> Mr. TAVENNER [counsel for both the subcommittee and Committee]. The question is as to whether or not you are refusing to produce the records directed to be produced under the subpoena?
>
> Mr. MCPHAUL. My answer to that is, I refuse to answer this or any questions which deal with possession or custody of the books and records called for in this subpoena. I claim my privilege under the fifth amendment of the United States Constitution.
>
> Mr. TAVENNER. My question to you was not answered by that statement, in my judgment. My question was whether or not you are refusing to produce the records which you were directed to produce under this subpoena?
>
> Mr. MCPHAUL. I have answered it in this statement.
>
> Mr. TAVENNER. No sir. You have stated that you refuse to answer any questions pertaining to them. I have not asked you a question that pertains to them. I have asked you to produce the records. Now, will you produce them?
>
> Mr. MCPHAUL. I will not.

The House of Representatives, approving the report of the Committee, cited petitioner for contempt (App. 51a).

The district court declined to charge the jury, as requested by petitioner, that the government must prove

the existence of the subpoenaed records and that they were in petitioner's custody or control (App. 100a-101a). Instead, the court charged (App. 90a–91a):

> If you find from the evidence in this case, and beyond a reasonable doubt, that the defendant appeared before the said subcommittee, and then refused or failed to make any explanation with respect to the existence of the records designated in the subpoena, or with respect to whether or not such records were under his possession or control, I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said subcommittee.
>
> I also charge you that the defendant is not excused from compliance with or producing the record designated in the subpoena merely because he is not designated as an officer or agent of the Civil Rights Congress therein; and neither is the defendant excused from such compliance with the said subpoena merely because of any lack of proof of any connection between the defendant and the Civil Rights Congress.

The court subsequently instructed the jury that one of the questions it must determine was: "3. Did the defendant wilfully fail or wilfully refuse to produce the records designated in the subpoena before the said committee or subcommittee?" (App. 92a).

The jury returned a verdict of guilty and petitioner

was sentenced to nine months' imprisonment and to pay a fine of five hundred dollars (App. 97a–98a). On appeal, the court of appeals affirmed.

ARGUMENT

1. Petitioner contends that the decision of the court of appeals was erroneous because (1) the government failed to prove the existence of the records or their possession by petitioner, and the trial court refused to submit these issues to the jury (Pet. 8–19); (2) the subpoena was so broad and all-inclusive as to constitute an unreasonable search and seizure (Pet. (19–22); and (3) the evidence failed to prove that the subpoenaed records were pertinent to the Committee inquiry or that the petitioner was fairly apprised of such pertinency (Pet. 22–24). Since, however, petitioner failed to raise these objections before the Committee, he was not entitled to claim such defenses in his trial for contempt.

This Court has held in a series of cases that a witness cannot raise issues at his trial which were not made before the Congressional committee issuing the subpoena or asking the questions. In *Bevan* v. *Krieger,* 289 U.S. 459, when the witness issued a "sweeping statement that he would answer no further questions," this Court held that such an attitude "on its face constitutes a contempt." *Id.* at p. 465. Therefore, the Court refused to consider whether the witness had a privilege not to answer the questions or produce the documents. Similarly, in *United States* v. *Bryan,* 339 U.S. 323, 333, the Court, citing its earlier decision in *Bevan,* held that the government need not prove a quorum of the committee where

this objection was not raised at the time the witness refused to comply with the subpoena, since "[t]o deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes." The Court then went on to state: "A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. * * * [I]f respondent had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives, by whose authority the subpoenas issued, would have required that she state her reasons for noncompliance upon the return of the writ." *Id.* at pp. 331, 332; see *United States* v. *Fleischman*, 339 U.S. 349, 352. And only last Term, in *Barenblatt* v. *United States*, 360 U.S. 109, 123, the Court stated that a witness' contentions as to the pertinency of the questions asked must be raised initially before the committee.[2]

These principles, repeatedly restated by this Court, fully apply to all the issues raised by petitioner here. Petitioner, when asked to produce the records, responded flatly: "I will not" (see *supra*, p. 4). This unqualified refusal to comply with the subpoena, without explanation or excuse, in itself constituted a contempt, which may not be removed or mitigated by objections raised for the first time at petitioner's trial.

[2] In fact, the Court said that the objection must be raised in a manner which is clear and specific enough "to trigger what would have been the subcommittee's reciprocal obligation had it been faced with a pertinency objection." 360 U.S. at 124.

2. Petitioner's principal contention—that the government failed to prove, and the jury did not decide, the existence of the records or their possession by petitioner, that is, the ability of petitioner to comply with the subpoena—is fully answered by this Court's decision in *United States* v. *Bryan*, *supra*. There, the witness argued that "lack of a quorum is a defense raising material questions of fact which should have been submitted to the jury" and that she "could not have complied with the subpoena in the absence of a quorum had she wished to do so * * *." 339 U.S. at 330. But the Court rejected these contentions by stating that if "a witness seeks to excuse a default on grounds of inability to comply with the subpoena, we think the defense must fail in the absence of even a modicum of good faith in responding to the subpoena." *Id.* at p. 332. And the Court then went on to consider a situation closely parallel to that involved here (*id.* at p. 333):

> Suppose one who has been summoned to produce papers fails to deliver them as required but refuses to give any reason. May he defend a prosecution for wilful default, many months later, on the ground that he had not been given a sufficient time to gather the papers? We think such a contention hardly tenable.

Similarly, it is "hardly tenable" for petitioner here to claim, long after he refused flatly to produce the documents, that they did not exist or, alternatively, that he did not have them. Even if, as petitioner so vigorously contends, the government has the initial burden of proof as to the issue of the existence and

control of documents (see *Traub* v. *United States*, 232 F. 2d 43, 47–48 (C.A.D.C.); *United States* v. *Patterson*, 219 F. 2d 659 (C.A. 2); cf. *United States* v. *Fleischman*, *supra*, 339 U.S. at 360–361), the defense must first be properly raised. The jury, having found pursuant to explicit instructions (*supra*, p. 5) that petitioner's refusal to produce was wilful, was not required to consider defenses[3] which were not raised at the proper time.[4]

Petitioner suggests (Pet. 14–15) that a requirement that he explain his non-production of the records might require him to incriminate himself.[5] He would not, however, incriminate himself simply by stating that he could not produce the records either because they did not exist or he did not have them, and he was not entitled to claim the privilege unless and until the questioning took a line which might incriminate him. Cf. *Rogers* v. *United States*, 340 U.S. 367,

[3] It is clear that the inability of a witness to comply with a subpoena is a defense. See *United States* v. *Bryan*, *supra*, 339 U.S. at 330; *United States* v. *Fleischman*, *supra*, 339 U.S. at 364.

[4] None of the cases cited by petitioner are in any way inconsistent with this view. Thus, in *United States* v. *Patterson*, *supra*, upon which he particularly relies (Pet. 8–10, 17), the witness had properly raised the issue of possession by stating, at the time of the demand, that he did not have the documents. *Id.* at p. 660.

[5] Petitioner, of course, cannot invoke the Fifth Amendment as to the *production* of the documents since an official or representative of an organization cannot invoke the privilege when ordered to produce the organization's books or records. *Rogers* v. *United States*, 340 U.S. 367; *United States* v. *White*, 322 U.S. 694; *Hale* v. *Henkel*, 201 U.S. 43, 72–75, 78.

372; *United States* v. *Coffey*, 198 F. 2d 438, 440 (C.A. 3. Thus, he could not refuse to make the simple statement that the documents did not exist or were not in his possession merely because a fuller explanation *might* incriminate him in some way which even now is not suggested.[6]

Moreover, petitioner could have raised this issue of the existence and possession of the documents without testifying at all. Petitioner's counsel, who was present at the subcommittee hearing, could have merely stated that the subcommittee must first show that petitioner had the documents within its control before they could demand their production or cite petitioner for contempt. Such a legal argument could not possibly have incriminated the witness. And had the issue been raised, petitioner need not have testified in support of his contention either before the subcommittee or at his trial since the government would have had the initial burden of offering evidence that the documents existed and were in petitioner's possession. See cases cited p. 9, *supra*.

---

[6] *Traub* v. *United States*, *supra*, which petitioner cites (Pet. 16), indicates that, if a witness states that he does not possess the subpoenaed documents, he need not answer further questions as to what happened to them if such answers might tend to incriminate him. 232 F. 2d at 48. But *Traub* clearly did not consider the issue involved here—whether a witness must state that he is unable to comply with the subpoena at the time he fails to produce—since there the witness clearly stated that he did not have the documents. *Id.* at p. 45.

[7] Petitioner also suggests (Pet. 13–14) that, since only the House of Representatives itself could decide the questions of

3. Petitioner's contention that the subpoena constituted an illegal search and seizure is likewise barred by *United States* v. *Bryan*, *supra*. Even if we assume, *arguendo*, that the subpoena was too broad and comprehensive, petitioner could have easily raised the issue before the subcommittee. Just as in *Bryan* the committee's investigation was obstructed for several years because of the lack of a quorum which could readily have been rectified in a few minutes (see 339 U.S. at 333), so here the subcommittee could have provided a more detailed request for documents if an objection had been made. And just as in *Bryan* it would have been an "empty formality" to require the committee to summon a quorum to hear the witness "refuse to honor its demands" (*id.* at p. 334), so here the petitioner's flat refusal to produce demonstrated that his refusal would continue regardless of the form or language of the subpoena.

Moreover, the subpoena here did not violate the Fourth Amendment. In *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208–209, this Court held that "the Fourth [Amendment], if applicable, at the

existence and possession of the records, he was not required to raise the point before the subcommittee. But the subcommittee represented the House and had the powers of the House to compel production (see *Watkins* v. *United States*, 354 U.S. 178, 200–201), although, of course, the House had power to overrule the subcommittee's determination by refusing to cite petitioner for contempt. Moreover, if Congressional committees can pass on such issues as privileges (*Bevan* v. *Krieger*, *supra*), quorums (*Bryan* and *United States* v. *Fleischman*, *supra*), and pertinency (*Barenblatt* v. *United States*, *supra*), and if therefore these issues must be raised initially before them, there seems no reason to distinguish an issue concerning the existence or possession of the documents.

most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. * * * [R]elevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry."[8] Petitioner does not contend that the subcommittee did not have authority to investigate Communism in the Detroit area (see *supra*, p. 2). And, as we show below (p. 13), the documents specified in the subpoena were directly pertinent to the subject of the investigation. Petitioner has made no showing that these requests made upon him were unreasonable in any way. Since in *Oklahoma Press Publishing Co.* this Court upheld subpoenas issued by an executive official which were as comprehensive as that involved here (cf. 327 U.S. at 210, note 46),[9] a subpoena issued by a Congressional committee, possessed of far broader investigative powers, must, *a fortiori*, also be valid.

4. The contentions raised by petitioner concerning

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[8] The Court also made clear in *Oklahoma Press Publishing Co.* that the Fourth Amendment's role in preventing improper use of subpoenas was much narrower than in prohibiting illegal searches and seizures. Unlike the abuses resulting from "actual search and seizures," the main objections to "officious intermeddling" is that it is expensive, time-consuming, and clogs "the processes of business." 327 U.S. at 213.

[9] Petitioner suggests (Pet. 23, note 7) that the subpoena here, in contrast to those in *Oklahoma Press Publishing Co.* was not limited in time. Since, however, the Civil Rights Congress was organized in April 1946 (see *Daily Worker*, April 24, 1946), the subpoena was in fact limited to a six-year period.

the pertinency of the subpoenaed records are also barred by *Bryan*. Moreover, in *Barenblatt* v. *United States*, *supra*, 360 U.S. at 123–125, this Court, in specifically considering this issue, made clear that objections considering pertinency must be raised initially before the Congressional committee.

In any event, the documents here were pertinent to the subcommittee's investigation, and petitioner was fairly apprised of their pertinency. At the opening of the hearing, the Committee chairman clearly stated that the purpose of the investigation was to determine whether there had been Communist activity in the vital defense area of Detroit, and, if so, the nature and extent of this activity (see *supra*, p. 3). The Committee had information that the Civil Rights Congress had been listed as a subversive organization and that the petitioner was an important official of that organization (see *supra*, pp. 2–3).[10] The records of the Civil Rights Congress relating to its organization, affiliation, receipts and expenditures were therefore pertinent to a determination whether it was Communist-dominated or infiltrated. And since the Civil Rights Congress was organized and operated in the Detroit area (see *Daily Worker*, April 24, 1946), the nature of Communist activity in the organization was directly pertinent to the subject of the investigation as expressed by the Committee chairman.

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[10] Moreover, two witnesses had earlier testified before the subcommittee that petitioner was a member of the Communist Party, App. 24a–25a; Hearings before the House Committee on Un-American Activities, 82d Cong., 2d Sess., Part I, pp. 2743, 2790; see *id.* at pp. 2840, 2842.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
J. WALTER YEAGLEY,
Assistant Attorney General.
KEVIN T. MARONEY,
GEORGE B. SEARLS,
Attorneys.

MARCH 1960.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 674

ARTHUR M. McPHAUL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

GOODMAN, CROCKETT, EDEN, ROBB & PHILO,
Attorneys for Petitioner,
3220 Cadillac Tower,
Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

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IN THE

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OCTOBER TERM, 1959

No. 674

ARTHUR M. McPHAUL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 272 F. 2d 627. A copy also appears at page 76 of the Transcript of Record.

JURISDICTION

The judgment of the Court of Appeals was rendered on December 5, 1959 and rehearing was denied on January 4, 1960. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. C., Sec. 1254.

The petition for writ of certiorari was granted on March 21, 1960.

QUESTIONS PRESENTED

I.

Where petitioner was tried for criminal contempt for failure to produce subpoenaed records before a Congressional Committee, may his conviction be sustained, consistent with due process and the right to a jury trial, where the Government failed to offer any evidence of the existence of the records or their possession by the petitioner, and the trial court refused to submit to the jury the issue of existence or possession by the petitioner of such records?

II.

Was the subpoena constitutionally objectionable for the reason that it was so broad and all-inclusive as to constitute an unreasonable search and seizure?

III.

Was the evidence sufficient to prove that the subpoenaed records were pertinent to the Committee inquiry?

STATUTES INVOLVED

2 U. S. C. Sec. 192,[1] provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000.00 nor less than $100.00 and imprisonment in a common jail for not less than one month nor more than twelve months."

The authority of the Committee is contained in H. Res. 5, 79th Cong. 1st Sess. 91 Cong. Rec. 10, 15:

> "The Committee on Un-American Activities, as a whole or by sub-committee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

---

[1] Sec. 194, which was also included in the indictment, sets forth the procedure for contempts arising under Sec. 192. Since no procedural issue is raised on this appeal, we do not set forth this section.

STATEMENT OF THE CASE

A sub-committee of the House Committee on Un-American Activities conducted a public hearing in the Federal Building in Detroit, Michigan on February 26th and 27th, 1952.

The hearing was opened by a statement from the Chairman of the Committee concerning some of the general objectives of the Committee and its procedures, in the course of which he said, concerning the purpose of the Detroit hearings:

> "The purpose of this investigation is to determine first, whether there has been Communist activity in this vital defense area (Detroit), and if so, the nature, extent, character and objects thereof" (Tr. 26).[2]

Petitioner was served with a subpoena which stated:

> "You are hereby commanded to summon Arthur McPhaul, 252 East Palmer, Detroit, Michigan, to be and appear before the Committee on Un-American Activities or a duly authorized subcommittee thereof of the House of Representatives of the United States, of which the Honorable John S. Wood is chairman, together with all the records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations, and all moneys received or expended by the Civil Rights Congress, in Room 737 Federal Building, Detroit, Michigan, Tuesday, February 26, 1952 at the hour of 10 A. M., then and there to testify touching maters of inquiry committed to such committee, and he is not to depart without leave of said committee" (Tr. 6).

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[2] (Tr. — refers to the Transcript of Record filed with this Court.)

Pursuant to the subpoena, petitioner appeared with counsel before the Sub-Committee on February 27th. After being sworn and stating his name, place and date of birth and that he had been served with the subpoena, he declined to answer all questions relating to the records described in the subpoena, claiming his privilege under the Fifth Amendment (Tr. [illegible]), except that the final question and answer were as follows:

> "Q. Mr. Tavenner: (The Committee Counsel.) No sir. You have stated that you refuse to answer any questions pertaining to them. I have not asked you a question that pertains to them. I have asked you to produce the records. Now, will you produce them?
>
> A. Mr. McPhaul: I will not" (Tr. 34).

An indictment against petitioner was returned on July 29, 1954 charging that petitioner was served with a subpoena to produce and that he wilfully failed to produce certain records before the Committee on Un-American Activities of the United States House of Representatives at a hearing held at Detroit, Michigan on February 27, 1952, and thereby violated Sections 192 and 194 of Title 2 of the U. S. C. (Tr. 4).

Petitioner moved to dismiss the indictment on grounds that the indictment and subpoena were insufficient, that the law creating the Committee was unconstitutional and that the subpoena violated petitioner's rights under the Fourth Amendment (Tr. 5). The motion was denied.

Trial commenced on December 18, 1956 and terminated on the following day. The Government called only one witness, Charles E. Potter, U. S. Senator from Michigan, who was at the time of the above-mentioned hearings a member of the House of Representatives and of its Com-

mittee on Un-American Activities. In addition, the Government introduced a number of official documents relied upon to show the authority of the Committee, Congressional approval of the contempt citation and a portion of the transcript of the Detroit hearings of the Committee on February 27, 1952 including the opening statement of the Chairman (Tr. 24-27 and 31-47).

At the conclusion of the Government's case, petitioner moved for a directed verdict of not guilty on the following grounds:

> (a) For all of the reasons set forth in his earlier written motion to disiniss;
>
> (b) There was no evidence that the subpoenaed records were pertinent to the investigation;
>
> (c) There was no evidence that, at the time of the service of the subpoena, the records were in existence;
>
> (d) There was no evidence that petitioner had custody or control of the records (Tr. 51-54).

The motion was denied in an oral opinion (Tr. 54-62) and petitioner offered no evidence.

Petitioner filed written requests to charge the jury concerning the duty of the Government to prove the existence of the subpoenaed records and that they were in petitioner's custody or control (Tr. 74). The Court declined to give such a charge and instead instructed the jury as follows:

> "If you find from the evidence in this case, and beyond a reasonable doubt, that the defendant appeared before the said Sub-Committee, and then refused or failed to make an explanation with respect

to the existence of the records designated in the subpoena, or with respect to whether or not such records were under his possession or control, I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said Sub-Committee" (Tr. 67).

"I also charge you that the defendant is not excused from compliance with or producing the records designated in the subpoena merely because he is not designated as an officer or agent of the Civil Rights Congress therein; and neither is the defendant excused from such compliance with the said subpoena merely because of any lack of proof of any connection between the defendant and the Civil Rights Congress" (Tr. 67).

"* * * the only elements of the alleged offense which are now left for you are as follows:

1. Was the defendant summoned to appear by the Un-A...erican Activities Committee of the House or Sub-Committee thereof and to produce certain records of the Civil Rights Congress?
2. Did the defendant appear before said Committee or Sub-Committee thereof?
3. Did the defendant wilfully fail or wilfully refuse to produce the records designated in the subpoena before said Committee or Sub-Committee?" (Tr. 68.)

A verdict of guilty was returned by the jury, and petitioner was sentenced to nine months' imprisonment and to pay a Five Hundred Dollar fine.

ARGUMENT

I.

WHERE PETITIONER WAS TRIED FOR CRIMINAL CONTEMPT FOR FAILURE TO PRODUCE SUBPOENAED RECORDS BEFORE A CONGRESSIONAL COMMITTEE, MAY HIS CONVICTION BE SUSTAINED, CONSISTENT WITH DUE PROCESS AND THE RIGHT TO A JURY TRIAL, WHERE THE GOVERNMENT FAILED TO OFFER ANY EVIDENCE OF THE EXISTENCE OF THE RECORDS OR THEIR POSSESSION BY THE PETITIONER, AND THE TRIAL COURT REFUSED TO SUBMIT TO THE JURY THE ISSUE OF EXISTENCE OR POSSESSION BY THE PETITIONER OF SUCH RECORDS?

The statute under which petitioner was indicted contains two distinct offenses: (1) refusal to answer questions, and (2) wilful default in producing papers. Petitioner was indicted only for wilful default in producing papers.

At the trial the Government introduced evidence to prove that petitioner had been served with a subpoena to produce records of the Civil Rights Congress and that he had appeared before the Sub-Committee but did not produce the records. No evidence was introduced to prove that the records were in existence, that petitioner had any relationship to the Civil Rights Congress[3] or that he had possession or control of the records.

Yet, although wilfulness is made an essential element of the offense, specifically set forth in the statute and

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[3] Exhibit No. 9 was offered by the Government in an effort to prove a connection between petitioner and the Civil Rights Congress. The exhibit purported to be the letterhead of the organization and to contain petitioner's name and signature as Executive Secretary. However, the Government was unable to identify the exhibit as relating to petitioner and it was rejected by the Court as evidence on this issue. (Tr. 47-51.)

charged in the indictment, petitioner was convicted of *wilfully* refusing to produce records which were not shown to have been in existence or within his power to produce.

The significance of "wilfulness" as an essential element of the offense here charged, was pointed out in *U. S. v. Murdock*, 29 U. S. 389, 397, 54 S. Ct. 223, where the Court, in analyzing Sec. 192, said:

> "Two distinct offenses are described in the disjunctive, and in only one of them is wilfulness an element."

At a minimum, in this type of statute, wilfulness denotes the act of a person "who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." *U. S. v. Illinois Cent. R. R. Co.*, 303 U. S. 239, 243, 58 S. Ct. 533. But if the subpoenaed records were not in existence and in petitioner's possession or control, he had no choice; and his failure to produce could not have been a wilful act. Yet the jury was permitted to convict petitioner of wilful refusal without any evidence that petitioner could have produced the records or that such records even existed.

In *U. S. v. Patterson*, 219 F. 2d 659 (C. A. 2nd), the issue, as to whether a person could be convicted of contempt for failure to produce records without proof of their existence and of defendant's possession, was specifically raised and decided. In that case the defendant had previously been convicted of criminal contempt for refusal to turn over to the Federal Grand Jury the records of the Civil Rights Congress. Unlike here, the evidence at Patterson's trial showed him to be Executive Secretary and in charge of the records of the organization. He served a 90-day sentence from July 1st to September 28, 1954.

In October, 1954, following his release, the defendant was again called before the Grand Jury where he again refused to answer any questions concerning the records, claiming the privilege of the Fifth Amendment. His second contempt conviction followed. On appeal, the Court, after finding that there was sufficient evidence that the records were in existence and under defendant's control in June, 1954, concluded that defendant's second conviction should be reversed because the Government had failed to prove existence of the records and control by the defendant in October, 1954 when the defendant again testified before the Grand Jury. The Court held:

> "The decision below rested primarily on a presumption of continued possession and existence held sufficient to constitute a *prima facie* case for the government. Neither the existing precedents nor the facts of the case warrant such a drastic shifting of the burden of proof in a criminal case."

This holding in *Patterson* was cited with approval by this Court in the more recent case of *Nilva v. U. S.*, 352 U. S. 385; 77 S. Ct. 431. *Nilva* involved a conviction for criminal contempt for failure to produce the records of a corporation of which defendant was an officer, pursuant to a subpoena issued to the corporation. The defendant appeared before the Court pursuant to the subpoena; he admitted that he was an officer of the corporation, and brought with him part of the records called for in the subpoena but stated his inability to locate the remaining records. Whereupon the Court ordered all the company records impounded and among these were found the records called for in the subpoena and not produced by the defendant. In its decision affirming the conviction in part, the Supreme Court held that there was sufficient evidence to support the charge that defendant had wilfully failed to produce certain of

the records called for in the subpoena. The Court framed the issue involved as follows:

> "This reduces the case to the charge that petitioner wilfully disobeyed the Court's order to produce certain corporate records required by subpoena No. 160. On that issue, it is settled that a criminal contempt is committed by one who, in response to a subpoena calling for corporation or association records, refuses to surrender *them when they are in existence and were within his control. United States v. Fleischman*, 339 U. S. 349, 70 S. Ct. 739, 94 L. Ed. 906; *U. S. v. White*, 322 U. S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542; *Wilson v. U. S.*, 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771; and see *U. S. v. Patterson*, 2 Cir., 219 F. 2d 659." (At p. 392.) (Our emphasis.)

In its finding on the issue thus framed, the Court held:

> "In our opinion, the evidence reasonably supports the conclusion *that those records were in existence and were within petitioner's control.*" (Emphasis supplied.)

Thus, this Court's most recent decision in this area of law recognized the rule that in criminal contempt, based upon refusal to produce records, the Government must prove that the subpoenaed records were in existence and that they were within the defendant's control.

In the present case no presumption of continued possession, as unsuccessfully asserted in *Patterson*, is possible since there is *no* evidence that the subpoenaed records were ever in existence or that petitioner was ever in possession or control. Indeed, the Trial Court did not base his opinion upon any presumption of possession, but rather on an entirely different legal premise. In denying petitioner's motion for a directed verdict, the Court stated his position as follows:

"Applying the decision in the *Bryan* and the *Fleischman* cases, this Court feels that the defendant now, abiding his time, comes into Court here and offers as a possible defense, or does claim as a defense that there is no proof that these records were in existence or that he had possession or custody of these records, or matters that he should have presented to the sub-committee when he appeared before that committee, and not have raised this defense or made this explanation or rather have raised this issue. Rather than having raised it before the sub-committee, he waits until he comes into Court and has a defense, and offers it as a defense in this case. The Court feels that he cannot do that; he should have given the sub-committee an opportunity to have explored these matters further at that time by questions or otherwise; and that not to have made such an explanation before the sub-committee at the time he appeared does not entitle him now to raise these matters by way of defense in this case.

So, as to those reasons, the Court also holds against the defendant, that it is not incumbent, in view of the record in this case, upon the Government to prove that the records were actually in existence or that the defendant had possession and control of the records" (Tr. 61).

And in his charge to the jury, the Court restated his position as follows:

"• • • I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because *if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said sub-committee*" (Tr. 67). (Our emphasis.)

The Court of Appeals accepted this view.

Thus, it was the view of both Courts below that unless a person who is subpoenaed to bring records of an organization asserts before the Committee the non-existence or lack of possession of the records as his reason for not bringing the records, the Government is relieved of its burden, at a subsequent contempt trial of proving their existence and his possession or control. Indeed, under the Courts' holding evidence on these issues could not even be introduced by the defendant. In adopting this position, the Courts here went even further than the Government's position in *Patterson*, where it only contended for a shifting of the burden of proof.

The Trial Court relied on *United States v. Bryan*, 339 U. S. 323, 70 S. Ct. 724, and *United States v. Fleischman*, 339 U. S. 349, 70 S. Ct. 739, to support his conclusion (Tr. 57-62). We believe the Court misunderstood the import of these decisions and that actually both of these cases support petitioner's position. Both the *Bryan and Fleischman* cases involved attempts by the House Un-American Activities Committee to obtain the records of the Joint Anti-Fascist Refugee Committee. In the *Bryan* case the Committee's subpoena was addressed to the Executive Secretary. In *Fleischman* it subpoenaed the members of the executive board. Miss Bryan admitted her official capacity and that the records were in her possession but denied the authority of the Committee to obtain them. In *Fleischman*, the board members admitted their official capacity, advised the Committee that the records were in Miss Bryan's possession, but took the position that each had no authority to act apart from action by the board as a whole, and that, since the board had not taken action, each member was unable to comply with the subpoena.

It will be observed that in both of these cases the official capacity of the defendant and the existence, and some element of control of the records was admitted or shown by the proofs, (*Fleischman*, at Note 3, p. 352), and that the majority and dissenting opinions agreed as to the necessity for such evidence. Thus, neither in *Bryan* or *Fleischman* was the Court called upon to decide, nor did it decide that the Government was exonerated from proof of evidence or control by reason of the witnesses' position before the committee. Indeed, language in the Court's opinion in *Bryan* presupposes that the burden of proof on these issues is always on the Government:

> "But when the Government introduced evidence in this case that respondent had been validly served with a lawful subpoena directing her to produce records *within her custody and control* and that on the day set out in the subpoena she *intentionally failed to comply*, it made out a *prima facie* case of wilful default" (at p. 330). (Our emphasis.)

What this Court actually held in *Bryan* and *Fleischman* was that the defense of lack of a committee quorum could not be raised for the first time at the contempt trial. This, however, cannot mean that *every* defense which a witness asserts at his contempt trial must first be raised and determined by the Committee. Two reasons will serve to point up why this cannot be the rule.

First, there obviously is no purpose in a witness being required to raise before a Committee an issue which the Committee is powerless to determine. The issue which petitioner here raised at his trial was the failure of the Government to present evidence essential to establish its charge of a "wilful" default—evidence of existence of the records and control by petitioner. The Committee, unlike

a Court dealing with a witness brought before it by subpoena, clearly lacked the authority to determine this issue.

Additionally, we deal with a situation where Congress did not elect to call the petitioner before its bar to resolve the issues raised by his refusal and to impose punishment itself (cf. *Jurney v. McCracken*, 294 U. S. 125, 55 S. Ct. 375); instead, it invoked the power of the Court to punish under a statute which requires that the default be found to have been "wilful."

The distinction between these situations is vital. The Court that issues a subpoena has power to make a legal determination of its validity and to impose punishment for a violation of the command of its subpoena. The Congress, when it elects to enforce its own subpoena, possesses a similar power and makes a similar determination. In either instance the tribunal which is to impose the penalty for the alleged violation is the only one competent to hear and to make a *legal* determination of the validity of a defense based upon an absence of wilfulness.

But a Committee has no such power. True, except as the Fifth Amendment may forbid, it may inquire into the existence and possession of the records. But this is done not for the purpose of determining the issue of "wilfulness" under the contempt statute; but, rather, for the purpose of eventually obtaining the records if they can be located.

Again, the issue which gave rise to the holding in *Bryan* and *Fleischman* is altogether different from that presented here. A Committee certainly has power to determine whether or not it has a quorum; and the lack of a quorum, if called to the Committee's attention, can be remedied by the Committee. Fairness to the Committee, therefore, demands that it be apprised at the hearing that a witness

intends to challenge the legal composition of the Committee. Otherwise, such a "procedural" point may be reasonably and properly be said to have been waived. But this rule does not support the holding of the Courts below that a witness waives his constitutional right to a trial at which evidence establishing the elements of the offense must be shown, because he fails to explain to the Committee at the hearing why he is unable to produce the subpoenaed records. Basic constitutional rights may not thus be waived.[4]

The second reason why *Bryan* and *Fleischman* are not controlling on the question here, is that in neither of those cases did the witness claim his Fifth Amendment privilege with respect to questions concerning the existence and possession of the documents. Indeed, in both of those cases the objection or defense based upon absence of a quorum could have been raised before the Committee without any fear that the witness' statement would tend to incriminate him.

Not so, however, with respect to a defense based upon lack of existence or control of the documents. As we show later, the assertion of this defense before the Committee would require that the witness testify. Petitioner here claimed his privilege with respect to "any question which deals with the possession or custody of the books and records called for in the subpoena" (Tr. 34). Clearly, in the setting created by the Chairman's opening statement (Tr. 25-27) and the prior testimony before the Committee (Tr. 19-22), petitioner was justified in invoking his privilege, and the Committee impliedly so ruled (Tr. 34). See *Emspak v. United States*, 349 U. S. 190 and *Quinn v. United States*, 349 U. S. 155.

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[4] See *Johnson v. Zerbst*, 304 U. S. 458, 464. (Courts must "indulge every presumption against waiver of fundamental constitutional rights"); and *Smith v. U. S.*, 337 U. S. 137, 150, ("Waiver of constitutional rights, however, is not lightly to be inferred").

If the view of the law taken by the Courts below in this case were upheld, it would effectively curtail the protection of the Fifth Amendment against self-incrimination: a protection which the Courts have uniformly upheld in recent years against infringement by Congressional Committees. For, with respect to the organizational records of claimed "subversive" organizations, the Committee need only substitute a subpoena duces tecum for the ordinary subpoena and cause the same to be served upon an alleged member. The alleged member-witness could hardly explain the existence or non-existence, his control or non-control of the organization's records, without also being required to explain his relationship to the organization and testify as to his knowledge of its records—information which he could not be compelled to give pursuant to an ordinary subpoena to testify. *Blau v. United States*, 340 U. S. 159, 71 S. Ct. 223.

Under the ruling of the Trial Court, however, such a member-witness, even if he were unable to produce the records, would have to risk either self-incrimination in his answers or be held in contempt for failure to produce the records since the Government would no longer have to prove existence or control and he would be precluded from making an affirmative defense on that ground. Just such a contention was met in *Traub v. U. S.*, 232 F. 2d 43, where the Trial Court's position was stated as follows:

> "A witness who fails to produce all the papers listed in a subpoena is guilty of contempt unless he demonstrates that he is acting in good faith. This demonstration of good faith requires that he answer questions relating to the existence and location of papers he has not produced even though the answers will incriminate him."

The Court of appeals answered this contention—identical to the position of the Trial Court here—as follows:

> "In other words the witness can then choose his own brand of hemlock. He can destroy himself either by failing to produce records called for by a subpoena (even if they are not in his possession or control when the subpoena was served); by refusing to answer questions (even if he has claimed the protection of the privilege); or by giving incriminating answers. This view is plainly untenable."

We have been unable to find a single Court decision in which a conviction for contempt for refusal to produce records pursuant to a subpoena was upheld where there was no evidence that the records were in existence and that the witness was in a position to produce them. In every such case which has come to our attention there was some evidence of existence of the records and ability to produce them. We are constrained to believe that the reason for the absence of any decision supporting the rule of law applied by the Courts below in this case, is the implicit assumption by all Courts that Constitutional due process demands that conviction for "wilful" refusal to produce records requires proof of the existence of the records and of a witness' ability to produce them.

The error made by the Court below in sustaining petitioner's conviction, notwithstanding the record failed to show existence of the subpoenaed documents or his control of them, is compounded by the Trial Court's denial of a jury trial to the petitioner on an essential element of the offense. If, as we have demonstrated above, proof of "wilfulness" required that the Government carry the burden of showing such existence and control, it follows that it was the province of the jury, and not the Trial Judge to

determine if that burden was met. Here, however, the Trial Judge, while submitting to the jury the question of "wilfulness," instructed them:

> "If you find from the evidence in this case, and beyond a reasonable doubt, that the defendant appeared before the said sub-committee, and then refused or failed to make any explanation with respect to the existence of the records designated in the subpoena, or with respect to whether or not such records were under his possession or control, *I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant*, because if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said sub-committee." (Tr. 67.) (Our emphasis.)[3]

What the Trial Court actually did by this instruction was to create a *conclusive presumption* by thus predicating a finding of existence and possession upon proof that the petitioner had failed to make an explanation before the Committee.

But this Court has held that unless a presumption may reasonably be inferred from a proven fact, a conviction based thereon constitutes a denial of due process (*U. S. v. Tot*, 319 U. S. 463). In this case, the only proven fact was petitioner's failure to produce the records. We do not believe that from this fact a reasonable inference can be

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[3] Compare this charge with that given by the Trial Court in *Fleischman* where the Court left to the jury for its determination the question whether the defendant had "control over the records subpoenaed and could have produced the records called for, but wilfully failed and refused to do so" (at p. 378).

drawn that the records were in existence and that petitioner had possession and control."

However, even assuming that petitioner's refusal to produce formed some rational basis for raising an inference of "existence, possession or control," thereby creating some evidence for the jury on these issues, there was no statutory or logical basis for the Trial Court's creating a *conclusive* presumption of existence and possession by withdrawing those issues from the jury. The reasons against such a rule are succinctly stated in *Wigmore on Evidence*, 3rd Ed., par. 2492, as follows:

> "In strictness, there cannot be such a thing as a 'conclusive presumption'. Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second.

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[6] At one point in his opinion denying petitioner's motion for a directed verdict, the Court referred to petitioner's testimony before the Committee where, in response to the question "Now, will you produce them?", petitioner answered "I will not," and said.

> "This Court feels that that is an absolute refusal to produce the records. At least, it is testimony from which this Court feels an inference may be drawn that this defendant did have the records under his custody or in his possession, and nevertheless refused to produce them. (Tr. 61.)"

The Court, however, eventually concluded that, whether petitioner had possession of the records or not, was not an issue which could be litigated in the absence of an explanation by him to the Committee, and the Court withdrew the matter from consideration by the jury. (See *supra*, pp. 6, 7.) It is petitioner's position, that even if the Court had taken the view that the issue of existence and custody of the records could be litigated, the foregoing testimony was insufficient to submit the issue to the jury since the answer was at least as consistent with innocence as guilt.

[7] See: *Hanson v. U. S.*, 208 F. 2d 914;
People v. Fleisch, 321 Mich. 443.

> fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence."

By his ruling the Trial Court, in effect, eliminated the element of wilfulness from the statutory definition of the offense, and thus made "a rule of substantive law" under which petitioner was convicted.

II.

WAS THE SUBPOENA CONSTITUTIONALLY OBJECTIONABLE FOR THE REASON THAT IT WAS SO BROAD AND ALL-INCLUSIVE AS TO CONSTITUTE AN UNREASONABLE SEARCH AND SEIZURE?

The Fourth Amendment applies to compulsory subpoenas. *Hale v. Henkel*, 201 U. S. 43; *Fed. Trade Com. v. American Tobacco Company*, 264 U. S. 298; *Brown v. U. S.*, 276 U. S. 134. In *Watkins v. U. S.*, 354 U. S. 178, this Court recognized that witnesses called before a Congressional Committee are entitled to the protection of the Fourth Amendment. In enumerating the constitutional rights which such a Committee was required to accord to a witness, the Court said:

> "They cannot be subjected to unreasonable search and seizure" (at p. 188).

In this case, the subpoena called upon the petitioner to produce the following documents:

> "All records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the Civil Rights Congress."

It will be observed that the subpoena is limitless as to time[7] and that the documents it seeks are not limited to any claimed scope of inquiry which the Committee might conceivably possess. Assuming, however, that the Committee had a legitimate scope of inquiry concerning communism, the subpoena did not attempt to limit the records subpoenaed even to that extent. The subpoena would compel the production of an unspecified amount of organizational records, unlimited as to time and as to the nature or character of the records sought. In this respect it is similar to the one issued in *Federal Trade Commission v. American Tobacco Company, supra*, which was held to be invalid under the Fourth Amendment. As to such a subpoena, Justice Holmes said:

> "Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. * * *
>
> "It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up."

Even if, among the mass of records ~~covered~~ by the subpoena, there might be some which would be pertinent to a proper objective of the Committee's inquiry, yet the scope of the subpoena is so broad as to constitute an unconstitutional search and seizure. In *Annenberg v. Roberts*, 2 A.

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[7] The Government concedes that the subpoena covered a period of six (6) years (Government brief in opposition to Petition for Certiorari p. 12, note 9).

(2d) 612, (Pa.), the Court, in holding similarly broad subpoenas to be unconstitutional said:

> "The subpoenas show on their face that they contemplate an unreasonable search and seizure. They violate the principle which we announced in the American Car Foundry case, 70 Atl. 867, * * * where we held that a *subpoena duces tecum could not properly be issued to have brought in a mass of books and papers in order that there might be a search through them to gather evidence.* We therefore are of the opinion that the subpoenas as issued commanding plaintiffs to produce before the Commission the things therein set forth are void in that they do not show that the demands therein are germane to the inquiry authorized by the Governor's call. * * *[8] (Our emphasis.)

Nor is there any evidence in this record which would justify the compulsory production of this vast array of records. The record is silent as to the content of the records, correspondence and memoranda sought or the purpose for which the monies received and expended were related to the proper objectives of the Committee's inquiry. As the Court said in *Hale v. Henkel, supra:*

> "Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers."

In this case no such necessity was shown before the Committee, nor, indeed, was any shown at the trial.

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[8] For other cases holding similar broad supoenas to be void as constituting an unreasonable search and seizure, see *Hale v. Henkel, supra; People v. Reynolds*, 350 Ill. 11, 182 N. E. 754.

III.

WAS THE EVIDENCE SUFFICIENT TO PROVE THAT THE SUBPOENAED RECORDS WERE PERTINENT TO THE COMMITTEE INQUIRY?

In *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, the power to issue and the right to resist a subpoena duces tecum of an agency of government was considered. The Court defined the right entitled to protection, as follows:

> "The gist of the protection is in the requirement, expressed in terms, that *the disclosure sought shall not be unreasonable*" (at p. 208).
>
> "Beyond this the requirement of reasonableness, including particularity in 'describing the place to be searched, and the persons or things to be seized', also literally applicable to warrants, comes down to *specification of the documents to be produced adequate*, but not excessive, *for the purposes of the relevant inquiry*" (at p. 209). (Our emphasis.)

In the light of these considerations, the Court then went on to consider whether the subpoena on its face and the other evidence was sufficient.[9]

The Court upheld the validity of the subpoena because of "allegations concerning coverage" and the showing that the Administrator "was proceeding with his investigation in accordance with the mandate of Congress and that the records sought were relevant to that purpose" (at p. 216).

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[9] The subpoena, issued by the Administrator of the Fair Labor Standards Act, sought production of the employer's records relating to coverage and to wages paid and hours worked (a subject clearly pertinent to the agency's authority) during a specified period. (See footnote 46 at p. 210 for full language of subpoena.)

Although the issue of the reasonableness of the subpoena in *Oklahoma Press* was framed in terms of the Fourth Amendment, the requirement of reasonableness under the Fourth Amendment, pertinency as an element of due process under the Fifth Amendment (*Watkins v. U. S.*, 354, U. S. 178, concurring opinion J. Frankfurter at p. 217), and definiteness as an essential element of every crime under the Sixth Amendment (*O'Connor v. U. S.*, 240 F. 2d 404), are interrelated and overlapping concepts. Each serves to clarify and buttress the other.

The testimony presented by the Government in this case on the issue of pertinency was taken on a separate record, outside the presence of the jury (Tr. 16-29). The witness, Senator Potter, himself summarized the Government's basic position in the following testimony:

> "As I testified before, the Civil Rights Congress had been declared a subversive organization by the Attorney General.[10] The committee found, along with the Attorney-General, that the Civil Rights Congress was a Communist front organization. The enunciated purpose of our hearings here in Detroit was to determine the extent of Communist activity in the area. Therefore, the Committee subpoenaed the records of the Civil Rights Congress as pertinent to our investigation" (Tr. 22).

The remaining relevant testimony on this issue showed that a witness before the committee had identified an Arthur McPhaul as a member of the Communist Party (Tr. 20), although the Government was unable to identify the petitioner as the person named by the witness (Tr. 28); that the petitioner had appeared before the Commit-

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[10] The Court, on petitioner's prior objection, ruled that he would have to strike the answer with respect to the Civil Rights Congress being a subversive organization unless better evidence was offered (Tr. 18). No better evidence was offered.

tee in response to the subpoena and had claimed the Fifth Amendment privilege with respect to all questions relating to the possession or custody of the records called for in the subpoena (Tr. 31-34).

Applying the yardstick used in *Oklahoma Press* to the foregoing facts to determine the reasonableness of the demand of the subpoena issued to petitioner, and that the specification of the records sought appeared to be relevant to the purpose of the inquiry, we submit that the evidence is insufficient.

In this case the stated object of the inquiry was to determine "whether there has been Communist activity in this vital defense area (Detroit) and if so, the nature, extent, character and objects thereof" (Tr. 26). This amorphous statement of objective is even more vague than "Communist infiltration in labor in Chicago", held insufficient in *Watkins v. U. S., supra* at p. 212, and was far below the specificity of subject matter ("Communism in education and the experiences and background in the party by Francis X. T. Crowley * * * in Michigan, Boston and * * * New York") held sufficient in *Barenblatt v. U. S.*, 360 U. S. 109, 124.

Even if the stated objective were held to be sufficiently clear to apprize the petitioner of the purpose of the inquiry, the only possible link between this objective and the records sought was questionable hearsay evidence that the Civil Rights Congress had been "declared a subversive organization by the Attorney General".[11] But this vague

[11] Compare the extensive evidence concerning the objectives of the organization whose records were subpoened in *Morford v. U. S.*, 176 F. 2d 54, 56 with the lack of proof here. The evidence here does not even show the purpose or objectives of the Civil Rights Congress in Detroit or the manner in which it functioned, other than as its name implied—an organization concerned with problems in the area of civil rights.

nexus is to the organization, not to the records. Without such a nexus there is no evidence here as to the character of the records sought or any indication as to the relationship (pertinency) between these records and the objectives of the Committee's inquiry.[12]

Petitioner, assuming he had possession, would be faced with the necessity of examining every receipt and expenditure of the organization and every record, letter and memoranda dealing with the organization and its affiliation with other organizations covering a period of at least six years, without any guide as to their pertinency other than their possible relationship to the subject of communist activity in the Detroit area. This, we submit, does not meet minimum constitutional standards which a Congressional committee must afford a witness.

The Court below held that since petitioner had "raised no objection on this ground (pertinency) before the Sub-Committee", he could not raise the issue for the first time at his contempt trial (Tr. 78). In *O'Connor v. U. S.*, 240 F. 2d 404 (C.C.A.D.C.) the Court was faced with a similar contention by the Government "that when the accused was before the Sub-Committee he did not complain that the question was too vague". This contention was answered, first by pointing out that "pertinency is made an essential element of the crime", and, second that, in any event, "the Sixth Amendment to the Constitution makes definiteness an essential element of every crime. For this reason definiteness as well as pertinency, must appear at the trial itself.".

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[12] To the extent to which the Government relies on the alleged listing by the Attorney General, it should be noted that the first such list was published in 1947 (13 Fed. Reg. 1471), while the subpoena calls for records from the inception of the organization, at least a year earlier.

Petitioner here had the right to be informed of the purpose of the Sub-Committee's inquiry and of the relationship of the subpoenaed records to that purpose so that he could determine whether the Sub-Committee was acting within its statutory grant of authority and in accordance with the Constitution. We submit that no such showing was made here.

CONCLUSION

The judgment below should be reversed.

GOODMAN, CROCKETT, EDEN,
ROBB & PHILO,
By: ERNEST GOODMAN,
Attorneys for Petitioner,
3220 Cadillac Tower,
Detroit 26, Michigan.

Dated: Detroit, Michigan,
August 22, 1960.

COPY

FILED

No. 33

In the Supreme Court of the United States

OCTOBER TERM, 1960

ARTHUR M. MCPHAUL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
J. WALTER YEAGLEY,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
Assistant to the Solicitor General,
KEVIN T. MARONEY,
GEORGE B. SEARLS,
LEE B. ANDERSON,
Attorneys,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 33

ARTHUR M. McPHAUL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 76–81) is reported at 272 F. 2d 627.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1959 (R. 75), and a petition for rehearing was denied on January 4, 1960 (R. 84). The petition for a writ of certiorari was filed on February 3, 1960, and was granted on March 21, 1960 (R. 85). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government established a prima facie case of wilful refusal to produce records before a Congressional Committee, in violation of 2 U.S.C. 192, by showing (a) that the Committee had a reasonable basis for believing that petitioner could produce the records, and (b) that petitioner offered no explanation or justification to the Committee for his refusal to produce, but merely stated "I will not" do so.

2. Whether petitioner's failure to raise before the Committee the contentions that (a) the subpoena was so broad as to constitute an unreasonable search and seizure, and (b) the subpoenaed documents were not pertinent to the Committee's inquiry, precluded him from raising those issues as defenses in his contempt trial.

3. If question 2 is answered negatively,

(a) whether the subpoena was unduly broad, and

(b) whether the evidence supports the district court's conclusion that the subpoenaed documents were pertinent to the inquiry.

STATUTE AND RESOLUTION INVOLVED

2 U.S.C. 192 provides:

> Every person who having been summoned as a witness by the authority of either House or Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to

> answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

The authority of the House Un-American Activities Committee is contained in H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

STATEMENT

Petitioner was convicted by a jury of wilfully failing and refusing to produce, pursuant to subpoena, records of the Civil Rights Congress before the House Un-American Activities Committee in violation of 2 U.S.C. 192 (R. 4, 72, 73). He was sentenced to nine-months' imprisonment and fined $500.00 (R. 73). The court of appeals unanimously affirmed (R. 76–81).

1. *The proceedings before the Committee.*

On February 13, 1952, petitioner was subpoenaed by the House of Representatives to appear before the

House Un-American Activities Committee in Detroit, Michigan, on February 26, 1952,

> together with all records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the Civil Rights Congress * * *.

and to "testify touching matters of inquiry committed to said Committee" (R. 6).

Prior to the issuance of the subpoena, the Committee knew that the "Civil Rights Congress * * * had been declared a subversive organization by the Attorney General" (R. 17), and the Committee itself had already also so found (R. 22). The "enunciated purpose" of the Detroit hearings "was to determine the extent of Communist activity in the area. Therefore, the committee subpoenaed the records of the Civil Rights Congress as pertinent to our investigation" (R. 22). Petitioner was subpoenaed to produre the records because the Committee "had information that Mr. McPhaul was executive director or executive secretary of the Civil Rights Congress" (R. 21, 17).[1]

At the opening of the hearing before a subcommittee in Detroit, the Chairman (Congressman Wood)

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[1] A letterhead of the Civil Rights Congress of the State of Michigan, contained in the Committee's official files (R. 45), listed "Arthur McPhaul" as the executive secretary (R. 48–49, 17). The trial court admitted the letterhead in evidence for its consideration as bearing on the issue of the pertinency of the subpoenaed records to the Subcommittee's inquiry (R. 50–51). However, the court sustained a defense objection to its admission "as evidence before the jury," apparently because there was no showing that the "Arthur McPhaul" there listed was the petitioner (R. 48–50).

explained the purpose of the hearing (R. 24-27). He stated (R. 25-26) that investigations in the City of Baltimore, the State of Massachusetts, "and other places has disclosed a concentration of Communist effort in certain defense areas of the country"; that during the Massachusetts hearings one of the witnesses had "detailed the method" by which the Massachusetts Communist Party "used its members employed in industry to keep the national organization of the Communist Party and the international Communist movement fully advised of industrial potentialities in that area"; that there was "no area of greater importance to the Nation as a whole, both in time of peace and in time of war, than the general area of Detroit"; and that

> The purpose of this investigation is to determine first, whether there has been Communist activity in this vital defense area, and if so, the nature, extent, character and objects thereof.

Petitioner, who was accompanied by counsel, appeared before the Subcommittee on February 27, 1952 (R. 30-31). The following colloquy then occurred (R. 31):

> Mr. WOOD: Mr. McPhaul, the committee has heretofore served upon you a subpoena duces tecum, to produce certain records and documents. Are you prepared to respond to that subpoena?
>
> * * * * * *
>
> Mr. WOOD: * * * Will you answer my question, Mr. McPhaul. Are you prepared to produce the documents and papers that have been

called upon for you to produce under the subpoena?

Mr. McPHAUL: Mr. Wood, I refuse to answer this or any question which deals with the possession or custody of the books and records called for in the subpoena. I claim my privilege under the fifth amendment of the Constitution.

* * * * *

Mr. TAVENNER [Committee counsel]: I would like to ask the witness if he has any other reason for refusing to produce the documents called for in the subpoena?

Mr. McPHAUL: I think my answer covers it.

* * * * *

Petitioner was then sworn (R. 32). After he had handed the Subcommittee copies of a prepared statement and a petition (R. 32–33), and he had answered preliminary questions, he was asked (R. 34):

Mr. TAVENNER: The question is as to whether or not you are refusing to produce the records directed to be produced under the subpoena?

Mr. McPHAUL: My answer to that is, I refuse to answer this or any questions which deal with possession or custody of the books and records called for in this subpoena. I claim my privilege under the fifth amendment of the United States Constitution.

Mr. TAVENNER: My question to you was not answered by that statement, in my judgment. My question was whether or not you are refusing to produce the records which you were directed to produce under this subpoena?

Mr. McPHAUL: I have answered it in this statement.

> Mr. TAVENNER: No, sir. You have stated that you refuse to answer any questions pertaining to them. I have not asked you a question that pertains to them. I have asked you to produce the records. Now, will you produce them?
>
> Mr. MCPHAUL: I will not.

The House of Representatives certified the matter to the United States Attorney for contempt proceedings (R. 38, 39, 41–44). Petitioner was indicted on July 29, 1954 (R. 4), and the court denied a defense motion to dismiss the indictment (R. 5, 55).

2. *The trial proceedings.*

At the trial, the Government called as a witness Senator Potter, who had formerly been a member of the House Un-American Activities Committee and had been present during petitioner's appearance before the Subcommittee (R. 8). Senator Potter explained the purposes of the hearing and why petitioner had been subpoenaed (see *supra*, p. 4), and identified various documents (R. 35–46). The Government introduced in evidence portions of the transcript of the hearing (which Senator Potter read to the jury) (R. 31–34, 35),[2] and pertinent papers in the contempt citation (R. 30). Petitioner offered no evidence.

The court refused to charge the jury, as requested by petitioner, that the government must prove the existence of the subpoenaed records and that they were in petitioner's custody or control (R. 62, 70–72).

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[2] The complete transcript of petitioner's appearance before the Subcommittee is printed in Hearings Before the House Committee on Un-American Activities on *Communism in the Detroit Area*, 82d Cong., 2d Sess., Part 1, pp. 2870–2876.

Instead, the court charged (R. 67) that if the jury found beyond a reasonable doubt that petitioner

> appeared before the said subcommittee, and then refused or failed to make any explanation with respect to the existence of the records designated in the subpoena, or with respect to whether or not such records were under his possession or control,

the jury

> may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said subcommittee.

The court further charged (*ibid.*) that petitioner was not excused from compliance with the subpoena merely because it did not designate him as an officer or agent of the Civil Rights Congress, or because of lack of proof of any connection between him and that organization.

The court instructed the jury that, in order to convict, it had to find (1) that petitioner had been summoned to produce certain records of the Civil Rights Congress before the Subcommittee, (2) that he had appeared before the Subcommittee, and (3) that he "wilfully fail[ed] or wilfully refuse[d] to produce the records designated in the subpoena * * *" (R. 68).

SUMMARY OF ARGUMENT

I

A. When the House Un-American Activities Subcommittee subpoenaed petitioner to produce certain designated records of the Civil Rights Congress, it "had information that Mr. McPhaul was executive director or executive secretary of" that organization (R. 21, 17). As such, he was clearly an appropriate official to call upon to produce its records, and the Subcommittee was reasonably justified in assuming, when petitioner appeared before it, that he could have done so.

Petitioner, however, offered no justification to the Subcommittee for his refusal to produce. Although he claimed his privilege against self-incrimination with respect to "any questions which deal with possession or custody" of the subpoenaed records (R. 34), this claim did not justify his refusal to produce the records of the organization. *United States* v. *White*, 322 U.S. 694, 699; *Rogers* v. *United States*, 340 U.S. 367, 372. Moreover, petitioner did not base his refusal to produce upon any claim of privilege; he merely stated, in response to the question whether he would produce the records, "I will not" (R. 34).

If, in fact, petitioner could not have produced the records, a simple statement to that effect could not have incriminated him. He cannot justify his refusal to make such a statement on the ground that he would then have been required to explain his non-possession. For he could properly claim his privilege with respect to any of such questions that might tend

to incriminate him. *Curcio* v. *United States*, 354 U.S. 118.

B. *United States* v. *Bryan*, 339 U.S. 323, fully supports the government's position that in these circumstances petitioner's unexplained refusal to produce the subpoenaed document constituted a prima facie "wilful" refusal to comply with the subpoena, in violation of 2 U.S. 192. In *Bryan*, in upholding a criminal contempt conviction for wilfully failing to produce records before a Congressional Committee, this Court held that the witness's failure to question the presence of a quorum when appearing before the Committee precluded her from raising the issue for the first time as a defense in her contempt trial. The Court stated (pp. 331–333) that if the witness "had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives * * * would have required that she state her reasons for noncompliance upon the return of the writ"; that "[t]o deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes"; and that "[i]f, therefore, a witness seeks to excuse a default on grounds of inability to comply with the subpoena, we think the defense must fail in the absence of even a modicum of good faith in responding to the subpoena." The fact that in the *Bryan* case the witness's connection with the organization and her control of the records were admitted does not weaken the applicability of its reasoning to the instant case. See, also, *United States* v. *Fleischman*, 339 U.S. 349, 360, 364.

C. When the government proved at the trial (1) that the Subcommittee had a reasonable basis for believing that petitioner could produce the records and (2) that he failed to offer any explanation or excuse to the Subcommittee for his refusal to do so, this established a prima facie case of wilful refusal to produce, and shifted the burden to petitioner to present some evidence to explain or justify the refusal. *United States* v. *Fleischman*, 339 U.S. 349, 364. When petitioner elected at the trial not to do so, he in effect removed that issue from the case. The judge, therefore, was justified in instructing the jury that it need not consider that issue.

Since "the relevant facts are peculiarly within [petitioner's] knowledge" (*United States* v. *Fleischman*, 339 U.S. at 363), and since "the prosecution is under a serious practical handicap if it must prove the negative proposition—that [petitioner] did not or had no good reason for failing to try to comply with the subpoena insofar as [he] was able" (*id.* at 362), this case is an appropriate one for applying the settled principle of criminal law that where "the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation" (*Morrison* v. *California*, 291 U.S. 82, 88–89), the burden of proof may be placed upon him to do so. Since petitioner failed to produce any evidence to justify his refusal to produce, the court was warranted in submitting the case to the jury, and the jury in convicting, upon the prima facie evidence of wilful refusal that the government introduced.

II

Petitioner also attacks his contempt conviction on the ground that the subpoena was unduly broad and that the evidence did not support the trial court's ruling that the subpoenaed materials were pertinent to the inquiry. Although we believe that these contentions are without merit, we think they are further subject to the threshold objection that petitioner's failure to raise them before the Subcommittee precluded him from urging them as a defense in his contempt trial.

The considerations relied upon in *United States* v. *Bryan, supra*, for holding that the witness's failure to urge before the Committee the absence of a quorum precluded her from raising that issue in her contempt trial, are equally applicable to the defenses that petitioner here sought to raise for the first time at his trial. For if petitioner believed that the alleged undue breadth of the subpoena and non-pertinency of the subpoenaed records were "legitimate reasons for failing to produce the records" (339 U.S. at 332), he was obligated so to advise the Subcommittee, and to give it an opportunity to correct the defects. Were the subpoena unduly broad, its scope could have been appropriately modified. Similarly, if petitioner had challenged the pertinency of materials sought, the Subcommittee could have explained their relevancy to him or, if some of the subpoenaed materials were shown to be unrelated to the inquiry, they could have been excluded.

III

A. The subpoena directed petitioner to produce "all records, correspondence and memoranda" of the Civil Rights Congress relating to three specified subjects: (1) "the organization of" the group, (2) its "affiliation with other organizations," and (3) "all monies received or expended by" it (R. 6). We submit that this demand was not unduly broad.

"[A]dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry" (*Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209). Since the Subcommittee's inquiry here was relatively broad, the permissible scope of materials that could be sought was also broad. Because the Subcommittee could not know precisely what books and records were kept by the Civil Rights Congress, the subpoena necessarily could only "specif[y] * * * with reasonable particularity, the subject to which the documents * * * relate" (*Brown* v. *United States*, 276 U.S. 134, 143). The subpoena here is no more sweeping than several that this Court has upheld.

B. The purposes of the Subcommittee's investigation were to determine whether "there has been Communist activity in this vital defense area [Detroit], and if so, the nature, extent, character and objects thereof" (R. 26). At previous hearings, the Committee had received information about a concentration of Communist effort in certain defense areas, and that Party members employed in industry were used to keep the Communist Party advised of industrial

potentiality in those areas. The Committee also had reason to believe that the Civil Rights Congress was a subversive organization.

We submit that this evidence warranted the trial court's ruling that the subpoenaed records of the Civil Rights Congress "were pertinent to the particular investigation" (R. 57). The circumstances and auspices under which the Civil Rights Congress was organized, the identity and terms of affiliation with other organizations, and the sources of its funds and to whom they were distributed, were all highly significant in determining whether the organization was being used by the Communists in the Detroit area. Thus, the documents were not "plainly incompetent or irrelevant to any lawful purpose of the [Subcommittee] in the discharge of [its] duties" (*Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509), but, on the contrary, were "relevant to the inquiry" (*Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209).

ARGUMENT

INTRODUCTION

The principal issue in this case is whether petitioner's conviction by a jury for "willfully" refusing to produce records before a Congressional Committee, in violation of 2 U.S.C. 192, is invalid because (1) the government introduced no evidence that the subpoenaed records were in existence and that petitioner had possession or control thereof, and (2) the trial court refused to submit these two issues to the jury. As this Court has pointed out, 2 U.S.C. 192 requires

"proof beyond a reasonable doubt that the refusal of the witness was deliberate and intentional" (*Flaxer* v. *United States*, 358 U.S. 147, 151; *Quinn* v. *United States*, 349 U.S. 155, 165). This does not mean, however, that such refusal need "necessarily be for an evil or a bad purpose"; it is enough that the refusal was "deliberate and intentional" in the sense that it was not "a mere inadvertence or an accident" (*Fields* v. *United States*, 164 F. 2d 97, 100 (C.A. D.C.), certiorari denied, 332 U.S. 851).

The government's proof in this case showed (1) that the Committee had a reasonable basis for believing that petitioner could produce the records of the Civil Rights Congress, and (2) that petitioner offered no excuse, justification, or explanation to the Subcommittee for his refusal to do so—he merely stated categorically that "I will not" produce them (R. 34). We shall show that this evidence established a prima facie case of willful refusal to produce under 2 U.S.C. 192, and shifted the burden to the defendant to come forward at the trial with evidence that he could not have complied, *i.e.*, either that the documents were not in existence, or that they were not in his custody or control. Since petitioner presented no such evidence, the district court was fully warranted in declining to submit those issues to the jury.

Petitioner challenges his conviction on two other grounds. He contends that the subpoena was so broad as to constitute an unreasonable search and seizure, and that the evidence was insufficient to show that the subpoenaed records were pertinent to the Subcommittee's inquiry. Petitioner, however, raised

neither of these issues before the Subcommittee, and under settled principles his failure to do so precluded him from raising them for the first time as a defense in his contempt trial. We shall further show that in any event the subpoena was not unduly broad and the documents subpoenaed were pertinent to the inquiry.

I

THE GOVERNMENT ESTABLISHES A PRIMA FACIE CASE OF WILFUL REFUSAL TO PRODUCE SUBPOENAED DOCUMENTS BEFORE A CONGRESSIONAL COMMITTEE IN VIOLATION OF 2 U.S.C. 192 BY SHOWING (1) THAT THE COMMITTEE HAD A REASONABLE BASIS FOR BELIEVING THAT THE WITNESS COULD PRODUCE THE DOCUMENTS AND (2) THAT THE WITNESS OFFERED NO EXPLANATION OR JUSTIFICATION TO THE COMMITTEE FOR HIS REFUSAL TO DO SO. IN THE ABSENCE OF ANY CLAIM OR SHOWING BY THE WITNESS AT THE TRIAL THAT HE COULD NOT HAVE PRODUCED THE DOCUMENTS, THE GOVERNMENT IS NOT REQUIRED TO ESTABLISH THAT, OR THE JURY TO CONSIDER WHETHER, HE COULD HAVE DONE SO

A. When the Committee subpoenaed petitioner to produce certain designated records of the Civil Rights Congress, it "had information that Mr. McPhaul was executive director or executive secretary of the Civil Rights Congress" (R. 21, 17; see the Statement, *supra*, p. 4). As such, he was clearly an appropriate official to call upon to produce the records of the organization (cf. *Lopiparo* v. *United States*, 216 F. 2d 87, 91 (C.A. 8), certiorari denied, 348 U.S. 916), and the Committee therefore had reasonable grounds for believing that he could produce them. The fact that the subpoena did not describe petitioner as an official

of the Civil Rights Congress is immaterial. Since it called upon him to produce records of that organization, it was obviously directed to him in his official capacity. If petitioner, in fact, was not an official of, or connected with, the organization, he could have so informed the Committee; and if, because of such nonaffiliation he would not have produced the records, he would, of course, have had a complete excuse for noncompliance (see *infra*, pp. 21–22).

Thus, when petitioner appeared before the Subcommittee, the latter was reasonably justified in assuming that he could have produced the records of the Civil Rights Congress. In his appearance, petitioner did nothing to contradict that conclusion. He never stated—or even suggested—that he was not connected with the Civil Rights Congress, that the subpoenaed records were not in existence, or that he could not produce them. Such claims, if established, would of course have excused nonproduction. *United States v. Bryan*, 339 U.S. 323, 330. Had petitioner made such a showing, the Subcommittee could then have taken whatever further steps might have been appropriate for obtaining the documents, such as subpoenaing them from someone else. The inquiry, in that event, might not have been blocked.

Petitioner offered no justification for his refusal to produce. While he claimed his privilege against self-incrimination with respect to "any questions which deal with possession or custody" of the subpoenaed records (R. 34), he did not base his refusal to produce upon any claim of privilege. He merely stated, in response to the question whether he would

produce them, but without explanation: "I will not." Of course, petitioner could not have based his refusal to produce upon a claim of self-incrimination. For it is well settled that "books and records kept in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate [their keeper] personally." *United States* v. *White*, 322 U.S. 694, 699 (1944)." (*Rogers* v. *United States*, 340 U.S. 367, 372; see *Curcio* v. *United States*, 354 U.S. 118, 122–123).

Petitioner argues (Br. 16–17), however, that a mere statement that he could not produce might have incriminated him. He suggests (Br. 17) that the "alleged member-witness could hardly explain the existence or non-existence, his control or non-control, of the organization's records, without also being required to explain his relationship to the organization and testify as to his knowledge of its records * * *." But if petitioner could not have produced, he was not required to "explain" why, but merely to have stated the fact. His simple statement that he did not have custody or control of the subpoenaed records could not have incriminated him, and would have given the Committee an opportunity to refute his claim or to take other steps to obtain the records.[3]

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[3] Petitioner argues (Br. 14–16) that only the House of Representatives itself, and not the Subcommittee, could decide the questions of existence and possession of the records; and that he was, therefore, not required to raise the point before the Subcommittee. But the Subcommittee represented the House and had the powers of the House to compel production (see

Of course, petitioner could properly claim his privilege as to any additional questions relating to "his relationship to the organization and * * * his knowledge of its records" that might tend to incriminate him: *Curcio* v. *United States*, 354 U.S. 118; *Traub* v. *United States*, 232 F. 2d 43, 48 (C.A.D.C.). But there is a fundamental distinction between answering such questions and merely advising the Committee that he could not produce. The latter statement would relate solely to the simple fact whether petitioner could comply, and by stating that he could not he would not be "opening the door" to further questions as to the location and existence of the records. Cf. *Rogers* v. *United States*, 340 U.S. 367, 374. Petitioner could be incriminated only if he supplied answers to the latter questions, and it is only with respect to such questions, therefore, that his claim of privilege could properly be made. He cannot, however, justify a refusal to state that he could not have produced the records—if that were the fact—on the ground that the Subcommittee might thereafter have asked him further questions that would have been incriminating.

Watkins v. *United States*, 354 U.S. 178, 200–201), and it could therefore pass upon all questions that directly related to that power. A Congressional Committee has been held to have authority to rule on such issues as the privilege of a witness not to answer (*Bevan* v. *Krieger*, 289 U.S. 459), the presence or absence of a quorum (*United States* v. *Bryan*, 339 U.S. 323), and the pertinency of the questions asked (*Barenblatt* v. *United States*, 360 U.S. 109). There is no reason why it should not also pass upon the existence or possession of documents.

B. Petitioner's unexplained refusal to produce the documents, not justified by his claim of privilege with respect to answering questions about his "possession and control" of them, is thus comparable to the "sweeping statement" of the witness in *Bevan* v. *Krieger*, 289 U.S. 459, 465, "that he would answer no further questions." This Court there held (*ibid.*) that "[s]uch an attitude indicates no desire for a hearing upon the propriety of the questions, but on its face constitutes a contempt." Similarly, in the instant case, petitioner's "attitude" toward the Committee—reflected in his statement, without explanation, that "I will not" produce the documents—"indicates no desire" to aid the Committee in carrying out its investigatory function by explaining why he would not comply, and thus giving the Committee an opportunity to take appropriate steps to obtain the records from other sources. Rather, it was an obvious flouting of the Committee's authority. As such, it constitutes a prima facie "wilful" refusal to comply with the subpoena, in violation of 2 U.S. 192.

United States v. *Bryan*, 339 U.S. 323, fully supports this conclusion. There, this Court held that, in a prosecution under 2 U.S.C. 192 for wilfully failing to produce records subpoenaed by the House Un-American Activities Committee, the failure of a witness to question the presence of a quorum when appearing before the Committee precluded her from raising the issue for the first time as a defense in her contempt trial. Citing *Bevan* v. *Krieger, supra*, the Court stated (p. 333) that "[t]o deny the Committee the opportunity to consider the objection or remedy

it is in itself a contempt of its authority and an obstruction of its processes." The Court pointed out (pp. 331–332) that a "subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase"; that "persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery"; that if the witness "had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives, by whose authority the subpoenas issued, would have required that she state her reasons for noncompliance upon the return of the writ"; and that "[i]f, therefore, a witness seeks to excuse a default on grounds of inability to comply with the subpoena, we think the defense must fail in the absence of even a modicum of good faith in responding to the subpoena."

The Court also posed the following hypothetical question (p. 333):

> * * * Suppose one who has been summoned to produce papers fails to deliver them as required but refuses to give any reason. May he defend a prosecution for wilful default, many months later, on the ground that he had not been given a sufficient time to gather the papers? We think such a condition hardly tenable. Yet, at the return date, compliance with the subpoena was "impossible" just as in the present case. * * *

The same reasoning applies to this case. Lack of "sufficient time to gather the papers" is just as valid an excuse for non-production as lack of control or possession of the documents. If it would be "hardly tenable" to "defend a prosecution for wilful default, many months later, on the ground that he had not been given a sufficient time to gather the papers," it would similarly be "hardly tenable" for the witness to defend on the ground that he did not have possession or control. Indeed, this is an even stronger case for holding against the defendant than the hypothetical case posed in *Bryan*. For here, unlike *Bryan*, petitioner has never contended—and does not to this day contend—that he could not have produced the subpoenaed records. His sole argument is that, although he concededly "fail[ed] to deliver [the subpoenaed records] as required but refuse[d] to give any reason," he could not be found to have "wilfully" failed to do so unless the government proved that he could have produced them. Thus, there is not even in this case the question whether petitioner's failure to raise before the Subcommittee his inability to comply would have precluded him from raising that issue at his trial—the issue considered in *Bryan*. For here petitioner has never suggested that he could not have complied.[4]

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[4] The fact that here petitioner has never contended that he could not have complied with the subpoena is one ground distinguishing this case from *Nilva* v. *United States*, 352 U.S. 385, *United States* v. *Patterson*, 219 F. 2d 659 (C.A. 2), and *Traub* v. *United States*, 232 F. 2d 43 (C.A. D.C.), upon which petitioner relies (Br. 9–11, 17–18). In each of those three cases, the defendant vigorously contended either that he had endeavored to

Similarly, in *United States* v. *Fleischman*, 339 U.S. 349, 364, in upholding a conviction for wilful refusal to produce subpoenaed records before the same Subcommittee, the Court again stressed that the burden of proving inability to comply rested on the witness. There the witness was a member of the executive board of the same organization involved in the *Bryan*

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comply with the subpoena in good faith, or that he could not have produced the subpoenaed documents.

1. In *Nilva*, which involved non-compliance with a court subpoena addressed to a corporation, the defendant (the company's Vice President) had produced a number of the subpoenaed items. He attempted to excuse his nonproduction of the remaining items on the ground that since someone else was "the sole custodian" of those records, he was required to produce "only what he in good faith was able to find" (Brief for Petitioner, No. 37, O.T. 1956, p. 49). This Court, noting that when Nilva "appeared in court in response to the subpoenas, he did not claim either want of actual possession of the required records or lack of opportunity or authority to produce them" (352 U.S. at 394), held (p. 395) that "the trial court had a sufficient basis for concluding that petitioner intentionally, and without 'adequate excuse,' defied the court," and that "the record sustains petitioner's conviction for criminal contempt * * *."

2. Patterson had previously been convicted of contempt for failure to produce records of the Civil Rights Congress which were then in his control as executive secretary. After his release from prison, the grand jury subpoenaed him to produce the same (plus other) records. He contended, however, that the records were no longer in his possession (219 F. 2d at 660–661). He was convicted of contempt, primarily on the theory of "a presumption of continued possession and existence [that was] held sufficient to constitute a prima facie case for the government" (219 F. 2d at 661). A divided court reversed the conviction, holding that "several significant facts" shown by the record "make continued existence and possession of the 1952 and 1953 records on the whole unlikely" (*ibid.*).

3. Traub's conviction of criminal contempt, insofar as it was based upon a refusal to produce documents pursuant to a grand

case; all members were subpoenaed to produce the records. Each refused to do so, on the ground that the secretary (Mrs. Bryan) rather than the board had custody of the records, and that no member individually could compel Mrs. Bryan to produce them. In holding that Mrs. Fleischman had wilfully refused to produce, this Court ruled that the government was not required to "negative each" possible excuse for non-compliance that the witness might have had, but that "the burden [was] on respondent to advance them as defense matter" (p. 360). It stated (p. 364, emphasis added) that even assuming, "contrary to the reasonable inferences to be drawn from respondent's statements before the Committee, that she may have made some effort to bring about compliance with the subpoena, *or had some excuse for failing to do so,* we think that under the circumstances here presented *the burden was upon her to present evidence to sustain such a defense.* And, in the absence of such evidence, we conclude that the evidence adduced by the Government amply sustains the conviction." Cf. also, *Nilva* v. *United States,* 352 U.S. 385, 394–395, discussed *supra,* n. 4, p. 23.

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jury subpoena, was reversed because (1) the trial court had not made it clear which documents Traub was directed to produce and (2) Traub "testified before the grand jury that he had produced all the documents designated in item 3 of the subpoena that were in his possession and control when the subpoena was served upon him" (232 F. 2d at 47). The court ruled (*ibid.*) that, since such testimony had not been refuted, it "must be accepted as establishing compliance with the subpoena."

In the instant case, however, as we have shown in the text, petitioner made no attempt either to comply with the subpoena, or to offer any justification for his refusal to do so.

It is true, as petitioner points out (Br. 13–14), that in *Bryan* the witness' connection with the organization and her control of the records were admitted (339 U.S. at 324). But those facts do not weaken the applicability of the reasoning in *Bryan* to the instant case. For in a case such as this, where the Committee had a reasonable basis for believing that petitioner could have produced the records, and petitioner offered no explanation for his refusal to do so and did not claim inability to produce, a subsequent attempt "to excuse a default on grounds of inability to comply with the subpoena * * * must fail in the absence of even a modicum of good faith in responding to the subpoena." (*Bryan, supra*, 339 U.S. at 332). And, as *Bryan* makes clear (*ibid.*), if the witness "had legitimate reasons for failing to produce the records * * * [it was] required that [he] state [the] reasons for noncompliance upon the return of the writ."

C. The government's proof here established a prima facie case of wilful refusal to produce because, in view of the Subcommittee's reasonable basis for believing that petitioner could produce and his failure to offer any excuse to the Committee for his refusal to do so, it was a reasonable inference that he could have done so. The burden was then shifted to petitioner to present some evidence to explain or justify his refusal. *United States* v. *Fleischman*, 339 U.S. 349, 364. When petitioner elected at the trial not to do so, he in effect removed that issue from the case. In these circumstances, the judge was fully justified in instructing the jury that it need not consider that

issue,[5] but only (1) whether petitioner was summoned to appear before the Subcommittee, (2) whether he did so, and (3) whether he "wilfully fail[ed] or refuse[d] to produce the records designated in the subpoena * * *" (R. 68). As we have shown, the evidence fully justifies the jury's verdict that petitioner's refusal to produce was in fact "wilful."

The principle, applied in *Bryan*, that the subpoenaed witness has the burden of promptly presenting any justification for non-compliance to the tribunal that issued the subpoena, is well settled. Many years ago, in language that is particularly pertinent to the instant case, the doctrine was stated as follows (*London Guarantee & Accident Co., Ltd.* v. *Doyle & Doak*, 134 Fed. 125, 128 (C.C. E.D. Penn.)):

> It cannot be doubted, I think, that the burden of proof was upon them. The court's order of June 25th necessarily implied that the books and papers were in existence, and within the defendants' reach. If they knew then that the facts were otherwise, it was their duty so to inform the court at once, and to object to the making of an order with which they must have known that they would not be able to comply.

[5] Contrary to petitioner's contention (Br. 19–20), the court's instruction that the jury should not consider whether the subpoenaed documents "were actually in existence or under the possession or control of the defendant" (R. 67) did not create a "conclusive presumption" of "existence and possession." The instruction merely reflected the fact that the government's proof had established a prima facie case of wilful refusal to produce, and that petitioner had not offered any evidence or justification at the trial. In these circumstances, the court properly ruled that there was no factual issue as to existence or possession to be resolved by the jury.

> Failure thus to act at the proper time is properly followed by imposing upon them the burden of excusing their apparent disobedience to the order; and the same result follows, even if they were ignorant concerning the existence and whereabouts of the books, but did not take the trouble to ascertain in advance whether or not they could comply with such an order, and contented themselves with resisting the application upon other grounds. When a court requires the production of documents, it is presumed that these can be had; and, while the presumption is not conclusive, it has force enough to compel the party upon whom the order is made to undertake the task of showing to the court's satisfaction why the order cannot be fully complied with. If he leaves the matter in doubt or uncertainty, the presumption is not overcome, and the usual consequences of failure must be borne by the party who has failed to sustain the burden of proof. * * *

See, also, *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541, 553; *Brown* v. *United States*, 276 U.S. 134, 144.

Such a shifting of the burden of proof of explanation to the defendant is an established principle of criminal law. As Mr. Justice Cardozo, speaking for a unanimous court in *Morrison* v. *California*, 291 U.S. 82, 88–89, explained:

> * * * The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the

> defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. * * *

In the instant case, the government's evidence "proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation" (*Morrison, supra*). Here, as in *United States* v. *Fleischman*, 339 U.S. 349, 362–363 (emphasis added), "the prosecution is under a serious practical handicap if it must prove the negative proposition—that [petitioner] did not or had no good reason for failing to try to comply with the subpoena insofar as [he] was able. * * *. On the other hand, the burden of the affirmative was not an oppressive one for [petitioner] to undertake; *the relevant facts are peculiarly within* [*his*] *knowledge.*" Since petitioner failed to produce any evidence to justify his refusal to produce, the court was fully warranted in submitting the case to the jury, and the jury in convicting, upon the prima facie evidence of wilful refusal that the government had introduced. Cf. *Rossi* v. *United States*, 289 U.S. 89.[6]

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[6] In *Rossi*, this Court upheld convictions of operating a still without registration or bond. The prosecution showed that the defendants had custody and control of the still, but did not introduce "affirmative evidence of failure to register the still or to give bond * * *" (p. 90). The Court "agreed" with the government's contention that "in such circumstances the burden of proof to show execution of the bond and registration of the still rested upon the petitioners; that having

II

PETITIONER'S FAILURE TO RAISE BEFORE THE SUBCOMMITTEE ANY QUESTION WITH RESPECT TO THE BREADTH OF THE SUBPOENA AND THE PERTINENCY OF THE SUBPOENAED MATERIALS PRECLUDED HIM FROM RAISING THOSE ISSUES AS A DEFENSE IN HIS CONTEMPT TRIAL

Petitioner contends (Br. 21–28) that the subpoena was "so broad as to constitute an unconsfitutional search and seizure". (Br. 22), and that the evidence is insufficient to support the trial court's ruling that the subpoenaed materials were pertinent to the Subcommittee's inquiry.[7] Although we believe that these contentions are without merit (see Point III, *infra*, pp. 32–37), we think they are further subject to the threshold objection that petitioner's failure to raise them before the Subcommittee precluded him from urging them as a defense in his contempt trial.

The considerations relied upon in *United States* v. *Bryan*, 339 U.S. 323, for holding that a witness's failure to urge before the Committee the absence of a quorum precluded her from raising that issue in

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failed to sustain this, the Judge properly declared them guilty as charged" (pp. 90–91). It stated (pp. 91–92): "The general principle, and we think the correct one * * * is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control."

[7] As petitioner recognized in the district court (R. 59), the question whether the subpoenaed documents were pertinent to the inquiry was for the judge, not the jury, to decide. *Sinclair* v. *United States*, 279 U.S. 263, 298; *Keeney* v. *United States*, 218 F. 2d 843, 845, 846, 849 (C.A. D.C.).

her contempt trial (*supra*, pp. 20–22), are equally applicable to the defenses that petitioner here sought to raise for the first time at his trial. Cf. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 653–654. For here, just as in *Bryan*, if petitioner believed that the alleged undue breadth of the subpoena and nonpertinency of the subpoenaed records were "legitimate reasons for failing to produce the records * * * a decent respect for the House of Representatives * * * would have required that [he] state [his] reasons for noncompliance upon the return of the writ" (339 U.S. at 332). Had he done so, the "defect" in the scope of the subpoena, "if any, was one which could easily have been remedied" (339 U.S. at 333). For if it were unduly broad, it could then have been appropriately modified. Cf. *Morton Salt, supra.* Similarly, if petitioner had challenged before the Subcommittee the pertinency of the material sought, its relevancy could then and there been explained to him or, if some of the subpoenaed materials were shown to be unrelated to the inquiry, they could have been excluded. Thus, the effect of petitioner's failure to raise these issues before the Subcommittee is that "the Committee's investigation was obstructed by an objection which, so far as we are informed, could have been rectified in a few minutes" (*Bryan*, 339 U.S. at 333).

The necessity that a witness specifically raise before the Committee any objection as to pertinency (and, by the same reasoning, as to scope) is clearly shown, we believe, by a comparison of this Court's decisions in *Watkins* v. *United States*, 354 U.S. 178

and *Barenblatt* v. *United States*, 360 U.S. 109. In *Watkins*, where this Court set aside a contempt-of-Congress conviction on the ground that the pertinency of questions put to the witness by the House Un-American Activities Subcommittee had not been adequately explained, the Court stated (354 U.S. at 214–215, emphasis added) that "[u]nless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, *upon objection of the witness on grounds of pertinency*, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto." The Court further noted (p. 214) that there the witness "objected to the questions on the grounds of lack of pertinency."

In *Barenblatt*, where a contempt conviction based on a refusal to testify before the same Committee was upheld, the Court stated (360 U.S. at 123) that "the factors which led us to rest decision on this ground [of pertinency] in *Watkins* were very different from those involved here." It pointed out (*ibid.*) that although in *Watkins* "the petitioner had made specific objection to the Subcommittee's questions on the ground of pertinency", "[i]n contrast, petitioner in the case before us raised no objections on the ground of pertinency at the time any of the questions were put to him."

Bryan indicates another reason why petitioner's failure to raise the issues before the Subcommittee precluded him from raising them at the trial. Here, as in *Bryan*, he "does not deny, and the transcript of the hearing makes it perfectly clear, that [he] would

not have complied with the subpoena * * * no matter how" (339 U.S. at 333–334) its scope had been reduced or in how much detail the Subcommittee had explained the pertinency of the records. Thus, "the fact that the alleged defect upon which [petitioner] now insists is, in [his] own estimation, an immaterial one, is clearly shown by [his] reliance before the Committee upon other grounds for failing to produce the records" (339 U.S. at 333), namely, a claim of privilege with respect to any questions as to their possession of control, coupled with an unexplained flat refusal to produce them.

III

IN ANY EVENT, THE SUBPOENA WAS NOT UNDULY BROAD AND THE EVIDENCE SUPPORTS THE TRIAL COURT'S CONCLUSION THAT THE SUBPOENAED DOCUMENTS WERE PERTINENT TO THE INQUIRY

A. The subpoena was not so broad as to constitute an unreasonable search and seizure

The subpoena directed petitioner to produce "all records, correspondence and memoranda" of the Civil Rights Congress relating to three specified subjects: (1) "the organization of" the group, (2) its "affiliation with other organizations," and (3) "all monies received or expended by" it (R. 6). We submit that this demand was not unduly broad.

"[A]dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry" (*Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209). The Subcommittee's inquiry here was a relatively broad

one—whether "there has been Communist activity in this vital defense area [Detroit], and if so, the nature, extent, character and objects thereof" (R. 26)—and the permissible scope of materials that could be sought was, therefore, also relatively broad.

Since the Subcommittee could not know precisely what books and records were kept by the Civil Rights Congress, the subpoena necessarily could only "specif[y] * * * with reasonable particularity, the subjects to which the documents * * * relate." *Brown* v. *United States*, 276 U.S. 134, 143. The demand for "all records, correspondence and memoranda" of the Civil Rights Congress relating to the three specified subjects described them "with all of the particularity the nature of the inquiry and the [Subcommittee's] situation would permit." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 210, n. 48. "[T]he description contained in the subpoena was sufficient to enable * * * [petitioner] to know what particular documents were required and to select them accordingly." *Brown* v. *United States*, *supra*. If petitioner had any doubt as to what was required, or could have shown that compliance was unduly burdensome or that the material sought was unrelated to the inquiry, he could—and should—have so advised the Subcommittee. See *supra*, pp. 29–32.

The subpoena in this case is no more sweeping than several that this Court has sustained against the challenge of undue breadth. Thus, in *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, this Court upheld an administrative subpoena which called for production of "[a]ll time cards, time books, employees' wage

statements and pay-roll records showing the hours worked each day and each week by, and the wages paid each pay period to, persons employed by the Endicott Johnson Corporation" in specified "factories or departments" and for specified periods ranging from 3 to 23 months (Record, No. 142, October Term, 1942, pp. 8–9).

Similarly, in *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 209, the subpoena, which this Court upheld on the ground that "the documents sought are relevant to the inquiry," called for the production of

> All of your books, papers and documents showing the hours worked by and wages paid to each of your employees between October 28, 1938, and the date hereof [October 14, 1943 (Record, No. 61, October Term, 1945, p. 11)], including all payroll ledgers, time sheets, time cards and time clock records, and all your books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods [p. 210, note 46].

See, also, the broad subpoena upheld in *Civil Aeronautics Board* v. *Hermann,* 353 U.S. 322 (Record, No. 540, October Term, 1956, pp. 39–60). The courts of appeals have upheld subpoenas of comparable sweep.[8]

[8] E.g., *Smith* v. *Porter,* 158 F. 2d 372 (C.A. 9), certiorari denied, 331 U.S. 816 ("[A]ll of the financial accounting, cost and other records, including but not limited to" specified cate-

The foregoing cases involved subpoenas issued by administrative officials or agencies. The instant subpoena, issued by a Congressional Committee, possessed of broader investigative powers, is, *a fortiori*, of permissible scope.[9]

Furthermore, since, as we shall now show, the material sought was pertinent to the Subcommittee's inquiry, the subpoena necessarily was not unreasonably broad. Petitioner's constitutional argument thus fails, since compulsory compliance with a reasonable subpoena *duces tecum* does not violate the Fourth Amendment. *Hale* v. *Henkel*, 201 U.S. 43, 76; *Wil-*

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gories); *Westside Ford* v. *United States*, 206 F. 2d 627 (C.A. 9) (various specified documents described by the court (p. 629) as "the documents relating to all sales of new automobiles and services performed thereon" during a specified period); *Shotkin* v. *Nelson*, 146 F. 2d 402, 404 (C.A. 10) ("all sales invoices, purchase orders, preference rating records, accounts receivable, notes receivable, bookkeeping journals and general ledgers, and all inventories taken in 1943 * * * showing the purchase, ownership and sale of electrical and light fixtures and supplies by you and by all and any of the companies * * * named, during the years 1943 and 1944").

[9] Petitioner contends (Br. 22) that the subpoena is "limitless as to time." This alleged defect, however, is more apparent than real. For, as petitioner himself states (*id.*, n. 7), the subpoena actually covers only the six-year period between the organization of the Civil Rights Congress in 1946 (see the report (p. 4) of the Subversive Activities Control Board in *Brownell* v. *Civil Rights Congress*, Docket No. 106-53, July 26, 1957, petition to review pending *sub nom. Civil Rights Congress* v. *Subversive Activities Control Board*, C.A. D.C., No. 14, 136), and February 1952. Plainly, this is "a reasonable period of time" (*Brown* v. *United States*, 276 U.S. 134, 143). See the subpoena upheld in the *Oklahoma Press* case, *supra*, which covered extensive records for a five-year period.

son v. *United States*, 221 U.S. 361, 376; *Oklahoma Press* case, *supra*, pp. 195–196, 208–209.

B. The subpoenaed documents were pertinent to the Subcommittee's inquiry

The purposes of the Subcommittee's investigation were to determine whether "there has been Communist activity in this vital defense area [Detroit], and if so, the nature, extent, character and objects thereof" (R. 26). At the previous hearings, the Committee had received information about "a concentration of Communist effort in certain defense areas of the country," and had learned that party members "employed in industry" were used "to keep the national organization of the Communist Party and the international Communist movement fully advised of industrial potentialities" in the area where they worked (R. 25). The Committee also had reason to believe that the Civil Rights Congress was a subversive organization (R. 17, 22, 45, 48–49).

We submit that this evidence warranted the trial court's ruling that the subpoenaed records of the Civil Rights Congress "were pertinent to the particular investigation" (R. 57). The circumstances and auspices under which the Civil Rights Congress was organized, the identity and terms of affiliation with other organizations, and the sources of its funds and to whom they were distributed, were all highly significant in determining whether the organization was being used by the Communists in the Detroit area. If, for example, the Civil Rights Congress had close affiliation with known or suspected Communist organizations, or if its funds had been received from such organizations

of were being used to support Communist activities in the area, these facts would be highly pertinent to the Subcommittee's inquiry—both of themselves and as possible sources of, and links to, other pertinent evidence.

In sum, the documents called for by the subpoena were not "plainly incompetent or irrelevant to any lawful purpose of the [Subcommittee] in the discharge of [its] duties" (*Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509), but, on the contrary, were clearly "relevant to the inquiry" (*Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209; see *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541, 554). No more is required to satisfy the standard of 2 U.S.C. 192, which authorizes the Congress to require production of papers in "any matter under inquiry before * * * any committee of either House * * *."

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
J. WALTER YEAGLEY,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Assistant to the Solicitor General.
KEVIN T. MARONEY,
GEORGE B. SEARLS,
LEE B. ANDERSON,
Attorneys.

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IN THE

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OCTOBER TERM, 1959

No. [redacted] 33

ARTHUR M. McPHAUL,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent

REPLY BRIEF OF PETITIONER

GOODMAN, CROCKETT, EDEN, ROBB & PHILO,
Attorneys for Petitioner,
3220 Cadillac Tower,
Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

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ARTHUR M. McPHAUL,
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Respondent

REPLY BRIEF OF PETITIONER

I.

In answering petitioner's claim that he could not be convicted of contempt of the House Committee on Un-American Activities, because of lack of any evidence to prove the existence of the subpoenaed records or possession by petitioner, the government advances the following proposition in its brief:

> "The government's proof here established a *prima facie* case of wilful refusal to produce because, in view of the Sub-Committee's reasonable basis for believing that petitioner could produce and his failure to offer any excuse to the Committee for his refusal to do so, it was a reasonable inference that he could have done so. The burden was then shifted to petitioner to present some evidence to explain or justify his refusal * * * When petitioner elected at the trial not to do so, he in effect removed that issue from the case." (Gov't Br. p. 25.)

We believe that this line of argument is fallacious for the following reasons:

1. The government seeks to import into the law relating to criminal contempt of congressional committees a new concept, the "reasonable" basis for belief by the Committee in the existence and possession of records as a substitute for proof at the trial. The government cites no authority for this proposition and we have found none. The decisions have uniformly held that proof of existence and possession are essential elements of the crime which the government must prove (Pet. Br. p. 11).

2. Accepting, arguendo, the government's theory, the record does not support its claim that a "reasonable" basis existed for the belief that petitioner could produce the records.

The government concedes that the *only* evidence in this record is that the Committee "had information that Mr. McPhaul was executive director or executive secretary of the Civil Rights Congress" (Gov't Brf. p. 16).

The testimony on this point is so brief that we quote it in full:

"A. (Senator Potter): I believe in 1947, I am not certain of the exact date. The committee had information that Mr. McPhaul, according to the letterheads of the Civil Rights Congress of the State of Michigan, that he was an executive director—executive secretary of the Civil Rights Congress and therefore that fell within the purview of our committee" (Tr. 17).

"A. (Senator Potter): The Committee had information that Mr. McPhaul was executive director or executive secretary of the Civil Rights Congress" (Tr. 21).

It should first be noted that even this skimpy testimony was introduced by the government on a separate record dealing only with the issue of pertinency and outside the presence of the jury. In presenting this argument in its brief the government ignored this fact. Yet it is difficult to understand how it can rely upon this evidence to support its claim that it established a *prima facie* case of wilful failure to produce records when the evidence was not offered or received for that purpose at the trial.

Nevertheless, it is on the basis of this evidence that the government argues that it is "a reasonable inference that he (petitioner) could have" produced the records. We submit, however, that the gap between this evidence and the conclusion sought to be drawn by the government, namely, that petitioner was in possession of the subpoenaed records, cannot be bridged by any rational or reasonable inference.

First, the Committee's belief was apparently based upon letterheads of the Civil Rights Congress "in 1947" showing that a Mr. McPhaul was executive director or executive secretary. Assuming that this information might permit

an inference that Mr. McPhaul had access to the organization's records in 1947, it does not permit an inference that he had possession five years later, in 1952, when the subpoena was issued. Cf. *U. S. v. Patterson*, 219 F. 2d 659; Pet. Br. p. 9, where the Court held that proof of the defendant's possession of records in June did not justify an inference of continued possession in October, four months later.

Second, there was no evidence to show that the McPhaul whose name appeared on the letterhead was the same person as petitioner. The government attempted to make such proof at the trial but was unable to do so and the letterhead was rejected as evidence (Tr. 47-51).

Third, there was no evidence that the Civil Rights Congress of Michigan was in existence in 1952 or that it had any records; or, if it did, that petitioner ever had any membership in or association or official position with the organization.

In the absence of any evidence that the records sought had existed and, if they had, of some relationship between the records and the witness at the time the subpoena was issued, it cannot be said that there was "a reasonable" basis for the belief that petitioner could produce the records.

3. The government argues that because the evidence showed that the Committee had "reasonable" grounds for believing that petitioner could have produced the records, "the burden was then shifted to petitioner to present some evidence to explain or justify his refusal." This argument misconceives the Trial Court's ruling.

The Trial Court did not hold that the government had made a *prima facie* case on the existence and possession

of the records, as the government now asserts. The Court assumed, correctly we believe, that *no* such evidence had been introduced, but held that the government was absolved from introducing any evidence on this issue. And, far from holding that the burden had shifted to the petitioner to introduce evidence as to non-existence or lack of possession, he made it clear that there was no burden to shift because these issues *could not be litigated at the trial at all*, since petitioner had failed to bring these matters to the Committee's attention at the time of his appearance. In his opinion denying petitioner's motion for a directed verdict, he said:

> "• • • he should have given the sub-committee an opportunity to have explored these matters further at that time by questions or otherwise; and that not to have made such an explanation before the sub-committee at the time he appeared does not entitle him now to raise these matters by way of defense in this case" (Tr. 61).

And again in his charge to the jury:

> "I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said sub-committee" (Tr. 67).

Thus, the rationale of the Trial Court was that a witness must raise the issue of non-existence or non-possession of records before the Committee so as to give it the opportunity to explore the matter further; that he cannot raise the issue for the first time at the trial because then it would be too late for the Committee to ask further

questions which might have resulted in the production of the records or, alternatively, in ascertaining that there were no such records.

The government adopts this same view:

> "Had petitioner made such a showing, (non-existence or non-possession) the sub-committee could then have taken whatever further steps might have been appropriate for obtaining the documents, such as subpoenaing them from someone else. The inquiry in that event, might not have been blocked." (Gov't Br. p. 17.)

But if this is the reason for the rule, then it would logically follow that the defendant should not be permitted to introduce evidence *at the trial* to prove non-existence or non-possession; for the evidence then (in this case four year later) would not assist the Committee in obtaining the records. This, of course, is precisely what the Trial Court held.

But the government, while accepting this rationale, also takes the incongruous and inconsistent position that the petitioner had the right to "present some evidence to explain or justify his refusal." The reason for this contradiction, we believe, is because the government's position is legally unsound.

On the one hand it relies principally on *U. S. v. Bryan*, 339 U. S. 323, where this Court held that, by not raising the procedural objection of lack of a quorum before the Committee, the defendant was foreclosed from raising the issue at the contempt trial. On the other hand, the government recognizes that existence and possession of records are not procedural matters which may be waived, as in *Bryan*, but are essential elements of the crime which must be proved by some evidence.

The government's dilemma thus stems from the Trial Court's decision that petitioner could be convicted of wilfully refusing to produce records without any evidence that the records were in existence or within his control. To uphold this decision requires, not the shifting of the burden of proof, but conviction without proof. This is the conclusion which logically flows from the government's premise, but which the government is apparently unwilling to urge upon this Court.

4. The government also contends, quoting from *U. S. v. Fleishman*, 339 U. S. 349, that

> "* * * the prosecution is under a serious practical handicap if it must prove the negative proposition—that [petitioner] did not or had no good reason for failing to try to comply with the subpoena insofar as he was able." (Gov't Br. p. 28.)

In *Fleishman*, as in *Bryan*, existence of the records and possession by Miss Bryan was admitted. The Court's remarks, as to the difficulty of proving a negative, were directed to the claim of the defendant that the government had not proved that further efforts on his part as a member of the organization's executive Board would have produced the records.

But in this case, the government was not required to prove a negative. To the contrary, it was required to prove a positive—that the subpoenaed records were in existence and that petitioner had some measure of custody or control. Proof of these two elements of the crime of contempt may indeed have presented a "practical handicap" to the government in this case, particularly if no such records existed or, if they did, that petitioner was in no position to produce them. But, if the presumption of in-

nocence is to obtain, the government is not entitled to a conviction without such proof.

II.

The government answers petitioner's claim (Pet. Br. pp. 16-17) that the Trial Court's ruling effectively curtailed his privilege against self-incrimination, by asserting that

> "'* * * it is well settled that books and records kept in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate [their keeper] personally.'"—quoting from *U. S. v. White*, 322 U. S. 694 (Gov't Br. p. 18).

In making this legal argument the government assumes what it was unable to prove—that petitioner was holding the subpoenaed records (if indeed such records existed) in a *representative* capacity. This assumption has no basis in the record. We have already shown (*supra* p. 4) that there is *no* evidence connecting petitioner with the Civil Rights Congress. And even if the testimony taken on a separate record on the issue of pertinency be considered on this aspect of the case, it showed only that a Mr. McPhaul was an officer of the organization in 1947, five years before the subpoena was issued.

Furthermore, the subpoena itself was not issued to the Civil Rights Congress and served on petitioner as its officer, nor was it addressed to him as an officer of the organization. It was addressed to him personally and re-

quested him to bring the records of the organization.* And when petitioner appeared before the Committee it was as an individual and not in any representative capacity.

Despite the fact that there is no evidence that petitioner held the organization's records (if any existed) in a representative capacity, the government would strip him of his right to the Fifth Amendment privilege by the hearsay statement of the witness that five years earlier a person with a similar name was listed as an officer of the organization.

If petitioner were *not* holding records in a *representative* capacity, it is conceded he would have the right to the privilege. If the government intended to rely upon this point to establish that the witness had no right to claim the privilege and therefore no right to withhold production of any organizational records in his possession, the burden was on the government to prove this fact at the trial. To deprive petitioner of the constitutional protection without

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*Decisions of this Court which have discussed the appropriate form for subpoenas to compel the production of organization or corporate records indicate that the subpoena should be issued to the corporation or organization and served upon an officer, or, in the alternative, issued directly to the officer *in his official capacity*.

See: *Wilson v. U. S.*, 221 U. S. 361 (Subpoena issued to corporation; served on defendant as president).

Brown v. U. S., 276 U. S. 134 (Subpoena issued to organization; served on defendant as secretary).

U. S. v. White, supra (Subpoena issued to union; served on defendant as president).

U. S. v. Bryan, supra (Subpoena issued to organization; served on defendant as executive secretary).

U. S. v. Fleishman, supra (Subpoena issued to organization; served on defendant as executive board member. See footnote 4, at p. 353, for discussion of this subject).

such proof is to effectively curtail the privilege in the manner pointed out in our main brief (p. 17).

Respectfully submitted,

GOODMAN, CROCKETT, EDEN, ROBB & PHILO,

By: ERNEST GOODMAN,
Attorneys for Petitioner,
3220 Cadillac Tower,
Detroit 26, Michigan.

Dated: October 7, 1960,
Detroit, Michigan.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 23

ARTHUR M. MURPHAIL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

GOODMAN, CROCKETT, EDEN, ROBB & PHILO,
Attorneys for Petitioner,
3220 Cadillac Tower,
Detroit 26, Michigan.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 33

ARTHUR M. McPHAUL,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

Now comes the petitioner, by his attorneys, and moves the Court for a rehearing of its decision issued on November 14, 1960, for the following reasons:

This Court's decision was based upon a mistake as to an essential fact.

This Court held that "The Government's proof at the trial thus established a *prima facie* case of wilful failure to comply with the subpoena" (Slip opinion p. 7).

The Government's proof was thus summarized by the Court:

> "The Government offered and there was received in evidence those portions of the transcript of the Detroit hearings which we have mentioned, various House documents authorizing the initiation of this proceeding, and *a letter on the letterhead of the Civil Rights Congress, dated February 16, 1952, over petitioner's name, and what purported to be his signature, as Executive Secretary.* (Emphasis added.) (S. O. p. 5.)

The Court concluded that this evidence "coupled with the evidence of his failure even to suggest to the Sub-Committee his inability to produce those records, clearly supported an inference that he could have produced them" (S. O. p. 7).

Thus, an essential link in this chain of evidence, which this Court held sufficient to support the inference of petitioner's possession of the records, was the letterhead dated February 16, 1952.

Apparently, this Court assumed that the organization listed on the letterhead was the same as the organization whose records were called for in the subpoena—the Civil Rights Congress. Indeed, the Court referred to the letterhead as that of the "Civil Rights Congress" and to petitioner "as Executive Secretary" of that organization.

In this assumption the Court was in error. The letterhead was that of the "Civil Rights Congress of the State of Michigan" with its address at Detroit; and it is so described in the Government's brief (p. 4 footnote 1).

The Government's witness, Senator Potter, also described the letterhead as that of "the Civil Rights Congress of the State of Michigan" (Tr. p. 17).

The Civil Rights Congress, to which the subpoena refers, was a national organization whose records were the subject of investigation in New York*, while the Civil Rights Congress of Michigan was an organization, as its name implies, organized and functioning within the State of Michigan.

Thus, while this Court held that an inference arises from identity of names (see footnote 4, S. O. p. 5), this inference would only permit the conclusion that petitioner was Executive Secretary of the Civil Rights Congress of Michigan and therefore, presumably, in possession of *its* records. But we do not believe it can justify the conclusion that petitioner was Executive Secretary of the Civil Rights Congress—the national organization, and therefore, by inference, in possession of the records called for by the subpoena.

It will be noted that petitioner was subpoenaed as an individual, not in any representative capacity. Absent the inference drawn from the letterhead as to petitioner's representative capacity with the Civil Rights Congress, his invocation of the Fifth Amendment privilege protected him against production of any records held in an individual capacity.

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*See *U. S. v. Patterson*, 219 F 2d, 659, where the 1952 and 1953 records of the Civil Rights Congress were sought by the Federal Grand Jury at New York by subpoena to its Executive Secretary, William Patterson. Also, *Matter of Tax Liability of Civil Rights Congress*, 124 Fed. Supp. 68, where William Patterson, its Executive Secretary, was found guilty of contempt for failure to produce records for the years 1950, 1951 and 1952. In *U. S. v. Field*, 193 F 2d 92, the Bail Fund of the Civil Rights Congress of *New York* was involved.

The Court's error in assuming that the letterhead was that of the Civil Rights Congress, was probably due to the failure of petitioner's counsel to point it out in his brief and oral argument. In extenuation, it should be noted that neither the Trial Court nor the Court of Appeals relied on the letterhead in reaching the conclusion that the Government had proved a *prima facie* case. Nor did the Government, in its brief or oral argument in this Court, make this contention. Indeed, the letterhead was not deemed important enough by either party to be included in the printed record.

Accordingly, petitioner respectfully requests this Court to grant a rehearing of its decision.

Respectfully submitted,

GOODMAN CROCKETT, EDEN,
ROBB & PHILO,

By:.....

Ernest Goodman,
3220 Cadillac Tower,
Detroit, Michigan.

Dated: November 25, 1960,
Detroit, Michigan.

CERTIFICATE OF COUNSEL

Ernest Goodman, attorney of record for Petitioner herein, hereby certifies that the foregoing Petition for rehearing is presented in good faith and not for purposes of delay.

.....

ERNEST GOODMAN,
Attorney for Petitioner.

Dated: November 25, 1960,
Detroit, Michigan.

SUPREME COURT OF THE UNITED STATES

No. 33.—October Term, 1960.

Arthur M. McPhaul, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[November 14, 1960.]

Mr. Justice Whittaker delivered the opinion of the Court.

We here review petitioner's conviction under 2 U. S. C. § 192[1] for willful failure to comply with a subpoena of the House of Representatives commanding him to produce certain records of the Civil Rights Congress before a Subcommittee of the House Committee on Un-American Activities. The principal questions presented are whether the evidence justified the trial court's rulings that the records called for by the subpoena were in existence, subject to petitioner's control, and pertinent to the Committee's inquiry.

The relevant evidence was as follows. Having knowledge that the Civil Rights Congress had been declared a subversive organization by the Attorney General—indeed, having itself earlier found that organization to be a sub-

[1] "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

versive one—and having reason to believe that petitioner was its Executive Secretary,[2] the House Committee on Un-American Activities caused a subpoena of the House of Representatives to be issued and served upon petitioner commanding him to appear before its Committee on Un-American Activities, or a subcommittee thereof, at a stated time and place in Detroit, Michigan, on February 26, 1952, and there to produce "all records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the Civil Rights Congress . . . [and] then and there to testify touching matters of inquiry committed to said Committee . . . ."

Upon the opening of the hearings before the Subcommittee at Detroit on February 26, 1952, the chairman made a public statement, saying, among other things, that earlier Committee hearings had "disclosed a concentration of Communist effort in certain defense areas of the country," consisting in part of keeping "the national organization of the Communist Party and the international Communist movement fully advised of industrial potentialities" in such areas, and that "there is no area of greater importance to the Nation as a whole, both in time of peace and in time of war, than the general area of Detroit," and he concluded with the statement that: "The purpose of this investigation is to determine first, whether there has been Communist activity in this vital defense area, and if so, the nature, extent, character and objects thereof."

Accompanied by counsel, petitioner appeared before the Subcommittee at the time and place commanded by the subpoena, and the following colloquy occurred:

> "Mr. WOOD [the chairman]: Mr. McPhaul, the committee has heretofore served upon you a subpoena duces tecum, to produce certain records and

[2] See note 4.

documents. Are you prepared to respond to that subpoena?

"Mr. WOOD: Will you answer my question, Mr. McPhaul. Are you prepared to produce the documents and papers that have been called upon for you to produce under the subpoena?

"Mr. McPHAUL: Mr. Wood, I refuse to answer this or any question which deals with the possession or custody of the books and records called for in the subpoena. I claim my privilege under the fifth amendment of the Constitution.

"Mr. TAVENNER [Committee counsel]: I would like to ask the witness if he has any other reason for refusing to produce the documents called for in the subpoena?

"Mr. WOOD: In order to complete the record, Mr. McPhaul is it in response to this subpoena that has just been read that you now decline, for the reason you have stated, to produce the documents and books and records therein called for?

"Mr. McPHAUL: I have stated the reasons, for the record.

"Mr. WOOD: Is it in response to this subpoena that you refuse to answer?

"Mr. McPHAUL: That is my answer that I have just given.

"Mr. WOOD: To this subpoena?

"Mr. McPHAUL: To that subpoena; yes."

Petitioner was then sworn, and, after submitting a prepared statement and answering a few preliminary questions, the following occurred:

"Mr. TAVENNER: The question is as to whether or not you are refusing to produce the records directed to be produced under the subpoena?

"Mr. McPHAUL: My answer to that is, I refuse to answer this or any questions which deal with possession or custody of the books and records called for in this subpoena. I claim my privilege under the fifth amendment of the United States Constitution.

"Mr. TAVENNER: My question to you was not answered by that statement, in my judgment. My question was whether or not you are refusing to produce the records which you were directed to produce under this subpoena?

"Mr. McPHAUL: I have answered it in this statement.

"Mr. TAVENNER? No, sir. You have stated that you refuse to answer any questions pertaining to them. I have not asked you a question that pertains to them. I have asked you to produce the records. Now, will you produce them?

"Mr. McPHAUL: I will not."

Following receipt of the Subcommittee's report of these occurrences, the House certified the matter to the United States Attorney for the Eastern District of Michigan for initiation of contempt proceedings against petitioner, and he was indicted on July 29, 1954. After denial of his motion to dismiss the indictment,[3] petitioner entered a

[3] Petitioner's motion to dismiss challenged the indictment on the grounds, among others, (1) that it failed to state "the relationship, if any, between the defendant and the Civil Rights Congress whose records defendant was required to produce," or that they "were subject to the control or in the custody of the defendant"; (2) that it failed to state facts showing "the inquiry [to be] within the purview of the" Subcommittee, "and the relevancy and materiality to [the] inquiry of the records called for in the subpoena," and (3) that the scope of the subpoena violated "defendant's rights under the Fourth Amendment to the United States Constitution."

plea of not guilty and the case was put to trial before a jury. The Government offered and there was received in evidence those portions of the transcript of the Detroit hearings which we have mentioned, various House documents authorizing the initiation of this proceeding, and a letter on the letterhead of the Civil Rights Congress, dated February 16, 1952, over petitioner's name, and what purported to be his signature, as Executive Secretary.[4]

Petitioner offered no evidence, but moved for a directed verdict of acquittal substantially on the grounds asserted in his motion to dismiss the indictment (see note 3) and on the further grounds that the Government had failed to adduce any evidence sufficient to show that the records called for by the subpoena were in existence and in petitioner's possession or control at the time he was served with the subpoena or that they were pertinent to the Subcommittee's inquiry. The motion was denied, and thereupon petitioner requested the court to charge the jury, in substance, that unless they found from the evidence and beyond a reasonable doubt that the records called for by the subpoena were in existence and in petitioner's custody or control at the time the subpoena was served upon him, they should find him not guilty. The court refused that request and, instead, charged the jury not to consider "whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because if the defendant had legitimate reason for failing to produce the said

[4] The letter—taken from the Subcommittee's files—was on the letterhead of the Civil Rights Congress, dated February 16, 1952—just 10 days prior to the Detroit hearing—over petitioner's name, and what purported to be his signature, as Executive Secretary. Despite the identity of names and the rule that "identity of names is *prima facie* evidence of identity of persons," *Stebbins* v. *Duncan*, 108 U. S. 32, 47, the trial court, upon petitioner's objection, excluded the exhibit from consideration by the jury but received it for his own consideration in respect to the questions of law presented.

records, he should have stated the reason for non-compliance with the subpoena when he appeared before the said subcommittee."

The jury found petitioner guilty, and he was fined the sum of $500 and sentenced to imprisonment for a period of nine months. The Court of Appeals affirmed, 272 F. 2d 627, and we granted certiorari, 362 U. S. 917.

Petitioner's principal contentions here are that there was no evidence showing that the records called for by the subpoena were in existence or, if it may be said that there was, that those records were in petitioner's possession or subject to his control, and the trial court therefore should have sustained his motion for a directed verdict of acquittal or, at the minimum, should have submitted those matters to the jury for resolution.

It is of course true that "[a] court will not imprison a witness for failure to produce documents which he does not have, unless he is responsible for their unavailability, cf. *Jurney* v. *MacCracken*, [294 U. S. 125] or is impeding justice by not explaining what happened to them, *U. S.* v. *Goldstein*, 105 F. 2d 150 (1939)." *United States* v. *Bryan*, 339 U. S. 323, 330–331. But, so far as the record shows, petitioner has never claimed—either before the Subcommittee, the District Court, or the Court of Appeals, and he does not claim here—that the records called for by the subpoena did not exist or that they were not in his possession or subject to his control. Rather, his claim, first raised at his contempt trial more than two years after his appearance before the Subcommittee, is that the Government failed to show that he could have produced the records before the Subcommittee, notwithstanding he has never claimed he could not produce them.

We think the Court's decision in *United States* v. *Bryan*, 339 U. S. 323, is highly relevant to these questions.[5] For

[5] See also the companion case of *United States* v. *Fleischman*, 339 U. S. 349, which is equally relevant to these questions.

it is as true here, as it was there, that "If [petitioner] had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives, by whose authority the subpoena issued, would have required that [he] state [his] reasons for noncompliance upon the return of the writ." *Id.*, at 332. Such a statement would have given the Subcommittee an opportunity to avoid the blocking of its inquiry by taking other appropriate steps to obtain the records. "To deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes. See *Bevan* v. *Krieger*, 289 U. S. 459, 464–465, (1933)." His failure to make any such statement was "a patent evasion of the duty of one summoned to produce papers before a congressional committee [: and] cannot be condoned." *Id.*, at 333.

The Government's proof at the trial thus established a *prima facie* case of wilful failure to comply with the subpoena. The evidence of the Subcommittee's reasonable basis for believing that the petitioner could produce the records in question, coupled with the evidence of his failure even to suggest to the Subcommittee his inability to produce those records, clearly supported an inference that he could have produced them. The burden then shifted to the petitioner to present some evidence to explain or justify his refusal. *Morrison* v. *California*, 291 U. S. 82, 88–89. But he elected not to present any evidence. In these circumstances, there was no factual issue, respecting the existence of the records or his ability to produce them, for resolution by the jury.

The Fifth Amendment did not excuse petitioner from producing the records of the Civil Rights Congress, for it is well settled that "books and records kept in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to

incriminate [their keeper] personally." *United States* v. *White*, 322 U. S. 694, 699 (1944)." *Rogers* v. *United States*, 340 U. S. 367, 372. And see *Curcio* v. *United States*, 354 U. S. 118, 122-123. Similarly, there is no merit in petitioner's argument that he could not have advised the Subcommittee that he was unable to produce the records without thereby inviting other questions respecting the records and thus risking waiver of his privilege against self-incrimination. *See Curcio* v. *United States*, 354 U. S. 118. Nor does the rule of *Blau* v. *United States*, 340 U. S. 694, excuse one subponaed to produce records in a representative capacity, *White* v. *United States*, 340 U. S. 694, from asserting inability to produce the records if, at a later contempt trial for failure to produce the records, he expects to put the Government t proof on that matter.

Inasmuch as petitioner neither advised the Subcommittee that he was unable to produce the records nor attempted to introduce any evidence at his contempt trial of his inability to produce them, we hold that the trial court was justified in concluding and in charging the jury that the records called for by the subpoena were in existence and under petitioner's control at the time the subpoena was served upon him.

Petitioner next contends that the evidence was not sufficient to show that the records called for by the subpoena were pertinent to the inquiry. In the first place, petitioner made no objection to the subpoena before the Subcommittee on the ground of pertinency, see *Barenblatt* v. *United States*, 360 U. S. 109, 123, but we need not rest decision on that score, for here "pertinency" was clearly shown. The stated purposes of the hearing were to determine "whether there has been Communist activity in this vital defense area [Detroit], and if so, the nature, extent, character and objects thereof." Earlier Subcommittee hearings had "disclosed a concentration of Com-

munist effort in certain defense areas of the country," consisting in part of keeping "the national organization of the Communist Party and the international Communist movement fully advised of industrial potentialities" in such areas, and the Subcommittee also had reason to believe that the Civil Rights Congress was being used for subversive purposes. The subpoena called for "all records, correspondence and memoranda" of the Civil Rights Congress relating to three specified subjects: (1) The "organization of" the group, (2) its "affiliation with other organizations," and (3) "all monies received or expended by [it]." It would seem clear enough that the auspices under which the Civil Rights Congress was organized, the identity and extent of its affiliations, the source of its funds and to whom distributed would be prime considerations in determining whether the organization was being used by the Communists in the Detroit area. If the Civil Rights Congress was affiliated with known Communist organizations, or if its funds were received from such organizations or were used to support Communist activities in the Detroit area, those facts, it is reasonable to suppose, would be shown by the records called for by the subpoena, and those facts would be highly pertinent to the Subcommittee's inquiry. It thus appears that the records called for by the subpoena were not "plainly incompetent or irrelevant to any lawful purpose [of the Subcommittee]" in the discharge of [its] duties," *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 509, but, on the contrary, were reasonably "relevant to the inquiry." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 209.

Finally, petitioner contends that the subpoena was so broad as to constitute an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution. "[A]dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature,

purpose and scope of the inquiry." *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, at 209. The Subcommittee's inquiry here was a relatively broad one—whether "there had been Communist activity in this vital defense area [Detroit], and if so the nature, extent, character and objects thereof"—and the permissible scope of materials that could reasonably be sought was necessarily equally broad.

It is not reasonable to suppose that the Subcommittee knew precisely what books and records were kept by the Civil Rights Congress, and therefore the subpoena could only "specif[y] . . . with reasonable particularity, the subjects to which the documents . . . relate." *Brown* v. *United States*, 276 U. S. 134, 143. The call of the subpoena for "all records, correspondence and memoranda" of the Civil Rights Congress relating to the three specified subjects describe them "with all of the particularity the nature of the inquiry and the [Subcommittee's] situation would permit." *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, at 210, n. 48. "[T]he description contained in the subpoena was sufficient to enable [petitioner] to know what particular documents were required and to select them accordingly." *Brown* v. *United States*, *supra*, at 143. If petitioner was in doubt as to what records were required by the subpoena, or found it unduly burdensome, or found it to call for records unrelated to the inquiry, he could and should have so advised the Subcommittee where the defect, if any, "could easily have been remedied." *United States* v. *Bryan*, *supra*, at 333. This subpoena was not more sweeping than those sustained against challenges of undue breadth in *Endicott Johnson* v. *Perkins*, 317 U. S. 501, and *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186.

Under these circumstances, we cannot say that the breadth of the subpoena was such as to violate the Fourth Amendment.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 33.—October Term, 1960.

Arthur M. McPhaul, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[November 14, 1960.]

Mr. Justice Douglas, with whom The Chief Justice, Mr. Justice Black and Mr. Justice Brennan concur, dissenting.

Today's decision marks such a departure from the accepted procedure designed to protect accused people from public passion and overbearing officials that I dissent.

The Act under which petitioner goes to prison permits conviction only if he "wilfully makes default" as a witness before a congressional Committee. 2 U. S. C. § 192. The subpoena demanded him to produce the records of "the Civil Rights Congress" at a given time and place. But it did not name petitioner as officer, agent, or member of "the Civil Rights Congress." The record contains no word of evidence to show (1) that petitioner was an officer, agent, or member of the Civil Rights Congress or (2) that petitioner was in possession of or was a custodian of any of the records of "the Civil Rights Congress." The congressional Committee made no effort to establish these facts. Neither did the prosecutor when this criminal proceeding came to trial. The only evidence, if it can be called such, is the refusal or failure of the petitioner to deny those facts.[1] The District Court charged the jury

[1] The respondent claims that the Committee, if not the court, had a "reasonable basis for believing that petitioner could produce the records." That basis turns out to be a letter in the Committee files, which the respondent made no attempt to link up with petitioner and which, for that reason, was never admitted into evidence.

that the failure of the prosecution to establish those facts was immaterial for the following reason:

"If you find from the evidence in this case, and beyond a reasonable doubt, that the defendant appeared before the said subcommittee, and then refused or failed to make any explanation with respect to the existence of the records designated in the subpoena, or with respect to whether or not such records were under his possession or control; I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under [illegible] session or control of the defendant, because if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said subcommittee.

"I also charge you that the defendant is not excused from compliance with or producing the records designated in the subpoena merely because he is not designated as an officer or agent of the Civil Rights Congress therein; and neither is the defendant excused from such compliance with the said subpoena merely because of any lack of proof of any connection between the defendant and the Civil Rights Congress."

This theory, now sustained by the Court, permits conviction without any evidence of any "wilful" default.

The presumption of innocence, deep in our criminal law, has been one of our most important safeguards against oppression. So far as I can find, this is the first instance where we have dispensed with it. We do so today by shifting the burden to a witness to show that he is not an officer or agent of the organization in question and that he is not able to produce the documents, without requiring

any proof whatsoever by the prosecution that connects the defendant either with the organization or with the documents. Reliance is placed on *United States* v. *Bryan*, 339 U. S. 323. With all deference, that case is irrelevant because there the witness concededly was "the executive secretary" of the organization being investigated and had "custody of its records." *Id.*, 324. The issue in the case concerned the authority of the Committee to make the demand, authority challenged, at the trial but not before the Committee, because no quorum of the Committee was present when the witness made default. In *United States* v. *Fleischman*, 339 U. S. 349, there was also evidence that the defendant had power to cause the documents to be produced. *Id.*, 353–354. In those situations the prosecution proves enough when it establishes custody or power to control. *Id.*, 361–363. As respects the shift of the burden of going forward in a criminal prosecution to the defendant (*Morrison* v. *California*, 291 U. S. 82, 88, 90–91), Mr. Justice Cardozo said by way of dictum, "For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance . . . or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge . . . ." *Id.*, 90–91. Whatever may be the reach of that dictum, it was not adequate to sustain a conviction in that case and is inadequate here. That case involved a charge of conspiracy to violate the alien land law of California. A citizen, charged as co-conspirator, was convicted on a presumption that he knew of the disqualification of his co-conspirator alleged to be an alien. The holding of the Court was that invocation of the presumption against the citizen denied him due process. *Id.*, 93. The alien was not a conspirator, "however guilty his own state of mind" unless the citizen "shared in the guilty knowledge and design." Therefore

said Mr. Justice Cardozo, "The joinder was something to be proved, for it is the essence of the crime." *Id.*, 93. That ruling rests on the presumption of innocence that is never overcome unless the prosecution introduces some competent evidence implicating the accused in the criminal act that is charged.[2] Here the crime is "wilful" default in the production of records of "the Civil Rights Congress." There can be no "wilful" default unless this petitioner is shown to have (1) *some* connection with that organization and (2) *some* custody or control of its records. Simple questions by the Committee[3] might have produced the necessary answers. It is hornbook law that they should have been asked.[4] Yet they were not; and without the foundation which they might have laid, the present prosecution has no starting point unless we are to throw procedural requirements to the winds.

Failure of a defendant to explain why he does not produce documents may be sufficient under the cases where it has first been shown that he has a connection with them. See *United States* v. *Fleischman*, *supra*, 360–363; *Nilva* v. *United States*, 352 U. S. 385, 392. But failure to explain, where no proof of the defendant's connection with the documents is shown, is like taking his action in standing mute as a confession of guilt. Once that was the rule. See *In re Smith*, 13 F. 25, 26–27; Beale, Criminal Plead-

[2] The assaults on this presumption have been vigorous and a few lower courts have succumbed as Goldstein, *The State and the Accused: Balance of Convenience in Criminal Procedure*, 69 Yale L. J. 1148, shows.

[3] Counsel for the Committee repeatedly asked petitioner to comply with the subpoena, but only once did he venture near the question of petitioner's power to comply. In the context of petitioner's invocation of his privilege against self-incrimination, Mr. Tavenner asked "if [petitioner] has any other reason for refusing to produce the documents called for." Again, the assumption is that the mere issue of the subpoena without more casts on the witness the burden of explaining non-compliance.

ing and Practice (1800) p. 52. Once it was the rule that a man who refused to take an oath and answer in criminal proceedings was held in contempt. *Trial of Lilburn*, 3 How. St. Tr. 1315. *See* Maguire, Attack of the Common Lawyers on the Oath *Ex officio* as Administered in the Ecclesiastical Courts in England, Essays in History and Political Theory (1936), c. VII, p. 215.

Today we take a step backward. We allow a man to go to prison for doing no more, so far as this record reveals, than challenging the right of a Committee to ask him to produce documents. The Congress had the right to get these documents from someone. But when it comes to criminal prosecutions, the government must turn square corners. If Congress desires to have the judiciary adjudge a man guilty for failure to produce documents, the prosecution should be required to prove that the man whom we send to prison had the power to produce them.